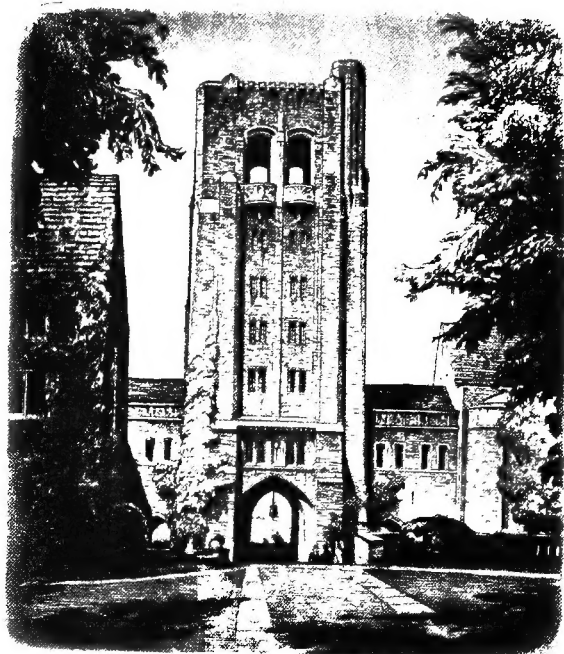




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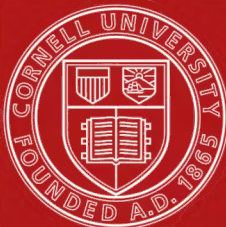
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A COLLECTION OF FORMS  
OF  
PRACTICE AND PLEADING

IN ACTIONS, WHETHER FOR LEGAL OR EQUITABLE RELIEF,  
AND IN SPECIAL PROCEEDINGS;

PREPARED WITH REFERENCE TO THE

CODE OF PROCEDURE

OF

*The State of New York,*

AND ADAPTED TO THE PRESENT PRACTICE IN THE STATES OF

OHIO, INDIANA, IOWA, WISCONSIN, MINNESOTA, CALIFORNIA,  
OREGON, MISSOURI, KENTUCKY, AND ALABAMA,  
AND THE ISLAND OF NEWFOUNDLAND.

WITH

COPIOUS NOTES AND AUTHORITIES

BY

BENJAMIN VAUGHAN ABBOTT

AND

AUSTIN ABBOTT.

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VOLUME I.

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of New York.

## P R E F A C E.

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THE object of this work is to present to the American practitioner a well-selected and ample collection of forms of Practice and Pleading in civil procedure, with especial reference to the changes in practice introduced in many of the States by the Code of Procedure, or Practice Acts.

We have been encouraged to undertake this work by the success of our *Forms of Pleadings in Actions under the Code of Procedure*, published in 1858. That work not only has enjoyed a considerable circulation, but has been referred to with approbation, and its forms and its arrangement largely copied, in several subsequent publications.

In the present volumes we have extended the work to include forms of Practice, so as to present in one series the whole procedure of actions. The chapter of Pleadings is based upon the former work; but the number of forms in this chapter alone is here about trebled; and each form has been remodelled so as to make every improvement which intermediate decisions and the present more settled state of practice appeared to sanction. Numerous forms of proceedings, both before and after pleading, are now added, pursuing that general arrangement which the most useful works of the kind show to be convenient.

In those respects in which the Codes of several States differ, these forms pursue the requirements of that of the State of New York; but these respects are mostly technical details, in which the usage of his own State is familiar to every practitioner. In regard to substance, we believe that these forms will be found generally safe guides in practice wherever the distinction between forms of action, and the distinction between actions at law and bills in equity, have been abrogated.



For the materials of this work we have preferred to rely chiefly upon actual precedents, which have been prepared for practical use, and subjected to the tests of actual litigation. Such material needs much revision to adapt it to general utility, but is obviously the best foundation for a collection like the present. For this we have had ample resources, both in the accumulations of a considerable practice, and in the course of reporting cases of practice for a number of years, and also in the kindness of members of the profession in this city and elsewhere. In addition to these, such of the standard Reports as seemed most valuable for this purpose have been examined; to enrich these pages with what has the express sanction of judicial opinion. Many such forms in the Reports, which would too rarely be of use to afford them space here, are referred to in notes, in connection with kindred forms in the text.

In addition to these chief resources, we desire to acknowledge much indebtedness to the labors of others, and particularly to Bullen and Leake's *Precedents of Pleading* (Lond., 1860); Chitty's *Forms of Practical Proceedings* (9th ed., Lond., 1862); McCall's *Forms* (New York, 1858); Nash's *Pleading and Practice under the Ohio Code* (Cincinnati, 1859); Swan's *Pleading and Precedents under the Ohio Code* (Cincinnati, 1861); Van Santvoord's *Equity Practice* (Albany, 1862); Tillinghast and Shearman's *Practice* (Vol. I., New York, 1861); *Equity Draftsman* (4th Am. ed., Phil., 1861); Whittaker's *Pr.* (3d ed., New York, 1863); Perkins' *Pleading and Practice under the Code of Indiana* (Indianapolis, 1859); Hoffman's *Provisional Remedies* (New York, 1862); and many other collections or treatises of less recent date.

In affidavits, as well as in pleadings, the method of stating each distinct portion of the subject in a separate paragraph has been pursued, in conformity to the English practice. This method, though not required with us, has great convenience, particularly in a manual for the draftsman, because it calls attention, separately, to each material element in the cause of action or the grounds of motion.

In regard to the modes of statement employed in pleadings,

affidavits, &c., it is to be observed that the practice does not establish invariable formulas, and therefore a precise uniformity of phraseology has not been studied. The practitioner will generally find the authorities relied on for sustaining each form indicated in the foot-notes, as well as brief statements of what may be serviceable in adapting the form to varying cases. Some of the forms, without doubt, may be made more concise without rendering them actually defective. But it is not the function of this work to attempt to improve the practice, but to present its best existing methods. It has been our endeavor not to put into the practitioner's hands such forms as would invite question, and would escape condemnation only by being intelligently defended; but rather to give such as would rarely be questioned. Simplicity and conciseness we have diligently sought authority for; but have not ventured to go beyond authority in introducing those qualities.

BENJAMIN VAUGHAN ABBOTT.

AUSTIN ABBOTT.

NEW YORK. April, 1864.

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In this edition (1873) changes made in the rules of the Supreme Court of New York, in the revision of 1870, are noted in their appropriate places, with a reference in each to the rule as numbered in 1870. Citations of those rules which have undergone no change have not been altered.



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# ABBOTTS'

## FORMS OF PRACTICE AND PLEADING.

### BOOK I.

#### ACTIONS.

#### CHAPTER I.

##### COMMON CAPTIONS AND CONCLUSIONS.

[CERTAIN captions and conclusions of papers, of constant occurrence, but which are generally familiar to practitioners, and easily remembered by the clerk, we give here, so that such matters may occupy less space in the following pages. The words [*Title of the cause*] or [*Title of the matter*], [*Venue*], [*At a special term, &c.*], occurring at the head of any form in subsequent chapters, indicate that the paper may properly be entitled accordingly.

All papers must be fairly and legibly written, and indorsed with the title of the cause.

All papers exceeding two hundred words in length should be folioed, which is done by underscoring the first word, and every hundredth word thereafter, and numbering them by figures opposite in the margin. (a)

In original papers, such as affidavits, petitions, and orders, all erasures or interlineations ought to be noted at the end, before the subscriptions.]

1. Caption of a preliminary petition to the court . . . . .	p. 2
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Captions of Petitions.

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1. *Caption of a Preliminary Petition to the Court. (b)*

To the Supreme Court of the State of New York [*or other court, giving its full official designation*].

The petition of \_\_\_\_\_, of the city of \_\_\_\_\_, shows.

2. *Caption of a Preliminary Petition to a Judge.*

To Hon. James Kent, one of the justices of the Supreme Court of the State of New York [*or other court or magistrate, as above*].

The petition of [*&c., as above*].

3. *Caption of a Paper in a Proceeding Pending, Not an Action. (c)*

*Supreme Court, county of*

In the matter of the application

of

A. B., an infant [*or other description*].

The petition of [*&c., or other introduction appropriate to the character of the paper.*]

(b) As to the cases in which a paper should be without title, see *note f, infra*.

(c) A paper which is merely a continuance of proceedings pending may be more briefly entitled than one

which is relied on in support of the jurisdiction of the court of the subject-matter, or to give notice to the adverse party of the court in which he is impleaded.

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Captions of Orders.

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4. *Caption of a Paper other than an Order of Court, in an Action.*

[*Name of court and county.*]

[ <i>Names of the plaintiffs,</i> ]	(d)	} Plaintiffs.
	against	
[ <i>Names of the defendants,</i> ]		
		Defendants.

---

5. *Caption of an Order of Court, in an Action.* (e)

At a special [*or, general*] term of the Superior Court of the city of New York, held at the City Hall of said city, on the 8th day of May, 1858.

Present—Hon. JOHN DUER, Justice.

[ <i>Names of plaintiffs,</i> ]	}
against	
[ <i>Names of defendants</i> ]	

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(d) In the summons and in the complaint, and in other documents in which the names of all parties are material, such as notice of pendency of action, judgment, &c., they should all be enumerated in the title of the cause. In papers in the common intermediate proceedings in the cause, it is enough to say A. B. and others, against C. D. and others, naming, however, enough of each side to identify the cause and distinguish it from any other in which the same parties may be concerned. *White v. Hess*, 8 *Paige*, 544. If there are two suits in which the parties are identical, the papers should be distinguished by adding in the blank

space at the right hand of the title, No. I., No. II., respectively; and it will be found very important for the convenience of the practitioner to make the same mark distinctly, under the title, upon the indorsement of each paper.

(e) The title of an order made at chambers is to be as form No. 4; and the date should be added at the foot of the order, where also the judge will subscribe it with a direction to enter it, if it be an order which should be entered. The error of obtaining a chamber order at special term, and entitling it accordingly, does not affect the validity of the order, if the judge

## Affidavits.

6. *Commencement and End of Affidavit.*

[Title, &amp;c., as above.] (f)

[City and] county of , ss. (g)

John Doe, of , [and, if there are two deponents, Richard Roe (h) of , severally] (i) being duly sworn, says [each for himself] (j) that he is an agent of the plaintiffs [or other description of the deponent.] (k)

[Statement of facts.] (l)

JOHN DOE, (m)

RICHARD ROE, his + mark. (n)

Sworn [or, affirmed] before me, (o)

this day of 186 , (p)

JOHN STILES,

Com'r of Deeds. (q)

signed it. Matter of Knickerbocker Bank, 19 *Barb.*, 602; Caldwell's Case, 13 *Abbotts' Pr.*, 405; S. C., 35 *Barb.*, 444. In the first judicial district also, —where motions except for a new trial on the merits may be made out of court,—the fact that an order which elsewhere must be made by the court, is made as a chamber order, does not invalidate it. Disbrow v. Folger, 5 *Abbotts' Pr.*, 53.

In the case of an order by the court, unless it is entered in the minutes at the time the decision is made, the judge subscribes a direction to the clerk to enter.

An order made upon an application not in an action, varies from Form 5 in having the words, "In the matter of the application of A. B., &c.," in the place of the names of the parties.

(f) An affidavit taken when there is no proceeding pending must not be entitled,—e. g., an affidavit on which to move for a mandamus. Haight v. Turner, 2 *Johns.*, 371; People v. Tioga C. P., 1 *Wend.*, 291; People v. Dikeman, 7 *How. Pr.*, 124. Compare Whitney v. Warner, 2 *Cow.*, 499; Nichols v. Cowles, 3 *Id.*, 345; Folger v. Hoogland, 5 *Johns.*, 235; Matter of Bronson,

12 *Id.*, 460. So of an affidavit before actual commencement of replevin. Milliken v. Selye, 3 *Den.*, 54; Stacy v. Farnham, 2 *How. Pr.*, 26.

Under the Code it has been held that a superfluous title in an affidavit may be disregarded as not affecting the substantial rights of the party. Pindar v. Black, 4 *Id.*, 95.

(g) The omission of the venue from an affidavit is deemed fatal. Lane v. Morse, 6 *How. Pr.*, 394; Cook v. Staats, 18 *Barb.*, 407. But the contrary was held in Chancery. Parker v. Baker, 8 *Paige*, 428; Barnard v. Darling, 1 *Barb. Ch.*, 218.

(h) The names of all the deponents should be mentioned. Anonymous, 2 *Chit. R.*, 19; S. C., 18 *Eng. Com. L. R.*, 235.

(i) It has been held that an affidavit made by several should show that the deponents were severally sworn. Pardoe v. Territt, 5 *M. & G.*, 291; S. C., 44 *Eng. Com. L. R.*, 159.

(j) That this is the proper form where several depose, see Kincaid v. Kipp, 1 *Duer*, 692; S. C., 11 *N. Y. Leg. Obs.*, 313.

(k) Where the description or residence of the deponent is material to

## Conclusion of Affidavits.

the affidavit, it is not enough to state it as a mere addition to his name, but it should be alleged directly as above. *Exp. Bank of Monroe*, 7 *Hill*, 177; *Cunningham v. Goellet*, 4 *Den.*, 71; *Staples v. Fairchild*, 3 *N. Y.* (3 *Comst.*), 41; *Payne v. Young*, 8 *N. Y.* (4 *Seld.*), 158. Compare *People v. Ransom*, 2 *N. Y.* (2 *Comst.*), 490. But it is not usually necessary for a party or attorney on the record to allege that he is such.

(b) Facts, and not inference and argument, are to be alleged; but belief is often material. Whether an allegation of a material fact, not positively made, but on information and belief, is sufficient, depends on the nature of the case. Particular instances will be found noticed in the following pages, as they arise.

(m) An affidavit should be subscribed by the deponent. This was the practice in Chancery. 1 *Newl. Ch. Pr.*, 165; *Hathway v. Scott*, 11 *Paige*, 173. And of late years, before as well as since the Code was enacted, this has been the practice in all the courts. The earlier cases of *Haff v. Spicer*, 3 *Cal.*, 190; *S. C.*, *Col. & C. Cas.*, 495; *Jackson v. Virgil*, 3 *Johns.*, 540, must be regarded as overruled. But where an affidavit is required upon an application to a magistrate, a subscription by the deponent is not necessary if the affidavit is taken down in writing by the magistrate to whom the application is made, and the oath administered by him. *Millius v. Shafer*, 3 *Den.*, 60. See, also, *Shelton v. Berry*, 19 *Tex.*, 154.

In the case of an affidavit made for the purposes of a motion, the omission of the subscription from the copy served may be disregarded, for on the motion the opposite party will have opportunity to see the original. *Graham v. McCoun*, 5 *How. Pr.*, 353; *Barker v. Cook*, 16 *Abbotts' Pr.*, 84.

(n) The jurat should be special (Form 8) where the deponent is a marksman. 1 *Tidd's Pr.*, 495; 3 *Moult. Ch. Pr.*, 551. The usual jurat is sufficient where the deponent is of peculiar religious belief, so that the common form of oath is not used. *Fryatt v. Lindo*, 3 *Edw.*, 239. Although some stress was laid in this case, which was a peculiar one, on the force of the word "duly" in the jurat, which is not commonly inserted, yet in an ordinary case a certificate that deponent was sworn, certainly imports that the ceremony of the oath was a valid and not a void one.

(o) The omission of the words "before me" in the jurat was held a fatal defect in *Regina v. Bloxham*, 6 *Q. B. R.*, 528; *S. C.*, 51 *Eng. Com. L. R.*, 526.

(p) The jurat should state the day on which it was sworn. *Doe v. Roe*, 1 *Chit. R.*, 228; *S. C.*, 18 *Eng. Com. L. R.*, 69. But the omission is not fatal, where it is shown, when the objection is raised, that it was sworn in due season for its purpose. *Schoolcraft v. Thompson* 7 *How. Pr.*, 446.

The venue sufficiently shows the place where the affidavit was taken. *Belden v. Devoe*, 12 *Wend.*, 223, 225, and note. *Manufacturers' & Mechanics' Bank v. Cowden*, 3 *Hill*, 461; 1 *Tidd's Pr.*, 496. And if it thereby appears that the affidavit was taken at a place beyond that where the officer was authorized to act, it will not be received by the court. *Davis v. Rich*, 2 *How. Pr.*, 86; *Sandland v. Adams*, *Id.*, 127; *Snyder v. Omstead*, *Id.*, 181.

(q) The jurat must be subscribed by the officer with his official addition. *Ladow v. Groom*, 1 *Den.*, 429; *Jackson v. Stiles*, 3 *Cal.*, 128; *S. C.*, *Col. & C. Cas.*, 468; though the contrary was held, as to the addition, in *Hunter v. Le Conte*, 6 *Cow.*, 728.

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 Jurats.
 

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 7. *Jurat, where the Deponent is a Lunatic. (r)*

Sworn before me, this            day  
 of            186 , I having  
 first examined the deponent, a  
 lunatic, as to the state of his  
 mind, and he appearing to me  
 to be now of sound mind, capa-  
 ble of understanding, and actu-  
 ally understanding, the nature  
 and contents hereof.

JOHN STILES,

Com'r of Deeds.

 8. *Jurat, where the Deponent is Blind, (s) or Illiterate. (t)*

Sworn before me, this            day  
 of            186 , the same  
 having been in my presence  
 [or, by me] read to the depo-  
 nent, he being blind [or, illiter-  
 ate], and he appearing to me to  
 understand the same.

[Signature as above.]

 9. *Jurat, where the Deponent is a Foreigner. (t)*

Sworn before me, this            day  
 of            186 , I having  
 first sworn M. N., an interpreter,  
 to interpret truly the same to  
 the deponent, who is a foreign-  
 er not understanding the lan-  
 guage, and he having so in-  
 terpreted the same to deponent.

[Signature as above.]

---

(r) Matter of Christie, 5 Paige, 242;  
 Matter of Cross, 2 Ch. Sent., 3.

(s) Matter of Christie, 5 Paige, 242.  
 (t) 1 Tidd's Pr., 495.



## Foreign Affidavit.

10. *Authentication of Affidavit taken Abroad.* <sup>(u)</sup>

STATE OF OHIO, }  
 Warren county, } ss.:

On this nineteenth day of December, A. D. 1854, personally appeared at Lebanon, in said county of <sup>(v)</sup> Warren, before me, J. C. D., judge of the Probate Court within and for said county, the above-named petitioner, W. M., who being by me duly sworn, on oath deposes and says; that the foregoing petition, signed by him, is true of his own knowledge, except as to the matters therein stated upon information and belief, and as to those matters he believes it to be true. [Signature.]

Sworn, subscribed, and taken before me at Lebanon, on the 19th day of December, 1854.

J. C. D.,  
 Probate Judge.

THE STATE OF OHIO, }  
 Warren county, } ss.:

I, M. W., clerk of the Probate Court within and for said county, do hereby certify that J. C. D., before whom the above affidavit was taken, is a member [being sole judge] of the Probate Court [*or other title*], which is a court of said State [*or, of the United States*], existing pursuant to the laws thereof, in and for said county [*or other district*], and that he is duly qualified and commissioned as such [and that said affidavit before him taken and acknowledged is in due form of law], and that the subscription to the same is his genuine signature.

Witness my hand, and the seal of said court, at  
 [L. s.] Lebanon, this 20th day of December, A. D.  
 1854.

M. W.,  
 Clerk Prob. Ct.

STATE OF OHIO, }  
 Warren county, } ss.:

I, J. C. D., judge of the Probate Court in and for said county, hereby certify, that M. W., whose certificate is attached

(u) Regulated by 2 Rev. Stat., 396.

(v) The place might be inferred from

the venue, but it is well to insert it in the body of a certificate made abroad.

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 Verifications.
 

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above, is clerk of said court, duly commissioned and qualified as such, and that his certificate and attestation above is authentic, and in due form of law.

Witness my hand at Lebanon, this December 20,

A. D. 1854.

J. C. D.,

Probate Judge.

The preceding form is supported by *Rogers v. McLean*, 14 *Abbotts' Pr.*, 440.

### 11. *Verification of Petition. (w)*

[*Venue, and introduction, as in Form 6.*](x)

That he has read [*or, heard read*] the foregoing petition subscribed by him, and knows the contents thereof; and that the same is [*or, where such papers are annexed*], and that the same and the accounts and inventories hereunto annexed are] true of his own knowledge, except as to the matters therein stated on information and belief and as to those matters he believes it [*or, them*] to be true. [Signature.]

[*Jurat.*]

---

(w) All petitions to the court should be verified. Anonymous, *Hopk.*, 102. Verifications of pleadings being subject to peculiar rules, are treated in the chapter of PLEADINGS.

(x) The verification, being underwritten at the foot of the petition, needs no new title of the cause or proceeding.

## Analysis of Chapter.

## CHAPTER II.

## DEMANDS, (a) NOTICES, AND SECURITIES, BEFORE SUIT.

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15. Offer to refer the same.....	12
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(a) A demand made after the commencement of the action, where demand is necessary, is not sufficient to support the action.

Under the Code of Procedure the service of the summons is deemed the commencement of the action as to the defendant on whom it is served, except for the purposes of the Statute of Limitations. *Code of Pro.*, § 127. At common law the delivery of the writ to the sheriff was deemed the commencement of the action. *Pierce v. Van Dyke*, 6 *Hill*, 613. But a delivery of process might be qualified by a written direction fixing a time at which it should be deemed

to have been received by the sheriff. *Walters v. Sykes*, 22 *Wend.*, 656. And where this is done, a demand made after the actual delivery, but before the time so fixed arrives, may perhaps be good. *Badger v. Finney*, 15 *Mass.*, 359. Where a special deputy was appointed to serve the writ, a demand made afterwards, but before the delivery of the writ to the special deputy, was held sufficient. *Boughton v. Bruce*, 20 *Wend.* 234.

Against the city of New York, demand before suit is required by statute in all cases. *Laws of 1860*, 645, ch. 379.

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 Notices to Quit.
 

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 12. *Notice to Quit, where right of re-entry is reserved for Non-payment of Rent, in default of goods whereon to distrain. (b)*

To Y. Z.

Take notice that I intend to re-enter on the land [*describing it*] demised by \_\_\_\_\_, to \_\_\_\_\_, and of a part [*or, the whole*] of which you have possession, unless the arrears of rent now due thereon shall be paid within fifteen days after the service of this notice. [*Signature.*]

[Date.]

 13. *Notice to Quit, where there is a Tenancy at Will or by Sufferance. (c)*

To Y. Z. (d)

Take notice that I hereby terminate your tenancy at will, or by sufferance, of [*describing the land*], and require you to remove therefrom on or before the \_\_\_\_\_ day of \_\_\_\_\_,

186 . (e)

[Signature.]

[Date.]

A provision for the same purpose in the charter of Buffalo, that no action or proceeding could be maintained for the collection of any demand or claim unless it had been audited, was held not to apply to actions for liquidated damages for a tort. *Howell v. City of Buffalo*, 15 *N. Y.*, 512. Compare, in the case of Brooklyn, *Hart v. City of Brooklyn*, 36 *Barb.*, 226.

(b) This form is supported by *Van Rensselaer v. Snyder*, 9 *Barb.*, 302; affirmed, 13 *N. Y.* (3 *Kern.*), 299. See the act of 1846, abolishing distress for rent. *Laws of 1846*, 369, ch. 274, § 3; *Mayor, &c., of N. Y. v. Campbell*, 18 *Barb.*, 156; *Keeler v. Davis*, 5 *Duer*, 507.

Under a lease reserving a right to re-enter in case of non-payment, if it appears on the face of the complaint that there was no sufficiency of goods whereon to distrain, the above notice to quit, required by the act of 1846, is

not necessary. *Rogers v. Lynds*, 14 *Wend.*, 172; *Mayor, &c., of N. Y. v. Campbell*, 18 *Barb.*, 156.

Though the common-law mode of re-entry is not taken away by the act of 1846, an entry pursuant to that act does not require the formalities, as to demand, of a common-law entry. The statute notice as above, is enough. *Van Rensselaer v. Snyder*, 9 *Barb.*, 302; affirmed, 13 *N. Y.* (3 *Kern.*), 299; *Van Rensselaer v. Smith*, 27 *Barb.*, 104.

A landlord may bring ejectment for recovery of possession of the demised premises when a half year's rent or more is in arrear, and no sufficient distress can be found on the premises; and the service of a declaration in such action of ejectment is a sufficient demand. 2 *Rev. Stat.*, 506, § 30. See, also, *Van Rensselaer v. Ball*, 19 *N. Y.*, 100; affirming *S. C.*, 27 *Barb.*, 104.

(c) See 1 *Rev. Stat.*, 745, § 7.

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 Demands against Executors, &c.
 

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14. *Affidavit to Claim presented to Executors or Administrators.* (f)

[Venue.]

A. B., being duly sworn, says, that the foregoing claim against the estate of M. N. deceased, is justly due and owing to this deponent [or, to the firm of A. B., C. D., and E. F. above named, of whom this deponent is one]; that no payments have been made thereon [except, &c., *if any*], and that there are no [other] offsets against the same, to the knowledge or belief of this deponent.

[Signature.]

[Jurat.]

(d) The notice is to be addressed to the immediate lessor who pays the annual rent, without reference to his servant or sub-tenant who may be in possession. *Jackson v. Baker*, 10 *Johns.*, 270.

(e) The notice must fix a time for the defendant to quit. *Wright v. Mosher*, 16 *How. Pr.*, 454. The time of one month given by the notice must have reference to the end of a month computed from the commencement of the tenancy. Thus, where the tenancy from month to month commenced on the first day of the month, a notice to quit, if intended for May, should be served on or before the first of April. *Anderson v. Prindle*, 23 *Wend.*, 616.

(f) A claim against the estate of a decedent should be presented to the representative with an offer to refer it, if disputed, before bringing an action, if the plaintiff would entitle himself to recover any costs in such action. 2 *Rev. Stat.*, 90, § 41. This provision, however, we consider is not applicable to the case of an action which was originally commenced against the deceased, and which upon his death the plaintiffs merely continued against the representatives. *Leman v. Wood*, 16 *How. Pr.*, 285; *Benedict v. Caffé*, 3 *Duer*, 669; *S. C.*, 12 *N. Y. Leg. Obs.*, 262; *Marsh v. Benson*, 11 *Abbotts' Pr.*,

248. To the contrary, however, was *McCann v. Bradley*, 15 *How. Pr.*, 79. It is not settled whether it is applicable to demands of a purely equitable nature. *Yorks v. Peck*, 9 *Id.*, 201; *Francisco v. Fitch*, 25 *Barb.*, 130; *Sands v. Craft*, 10 *Abbotts' Pr.*, 216.

The statute is not applicable to claims in favor of the estate made by the executor or administrator against others, except to allow them to be interposed strictly in the way of set-off. *Akely v. Akely*, 17 *How. Pr.*, 21.

The demand may be presented before any notice to creditors has been given. *Johnson v. Corbett*, 11 *Paige*, 265; *Russell v. Lane*, 1 *Barb.*, 519.

It may be presented by letter, or in any other way which deals fairly with the executor and the interests he represents; and the claimant need not produce vouchers in support of the demand, nor an affidavit, unless requested. *GANSEVOORT v. NELSON*, 6 *Hill*, 389; *Russell v. Lane*, 1 *Barb.*, 519. But it is the better practice where the executor has advertised for claims to be presented, to produce the voucher and affidavit in the first instance, for it is usual to require it.

After a demand upon executors or administrators, and an offer to refer the claim, a reasonable time must be given them to consider it. *Buckhout v.*

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Reference of Claim against Executors, &c.

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15. *Offer to refer Claim against Executors, &c. (g)*

To Y. Z., executor [or, administrator] of the estate of M. N.

I hereby offer to refer the foregoing claim to one or three referees, to be approved by the surrogate, to hear and determine the same, according to the statute. [Signature.]

[Date.]

16. *Agreement to refer Claim against Executors and Administrators.*

WHEREAS A. B., has presented a claim to Y. Z., executor of the will [or, administrator of the estate, or, administrator with the will annexed] of M. N., late of the city of New York, deceased, which claim he states as follows: [setting forth the cause of action as it would be stated in a complaint.] (h)

And whereas said executor [or, administrator] doubts the justness of such claim;

It is now agreed between A. B., and said executor [or, administrator], to refer (i) the matter in controversy to R. S. of , T. U. of , and V. W. of , as referees [or, to R. S. of , as sole referee], (j) to hear and determine the matter according to the statute.

[Date.]

[Signatures.]

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Hunt, 16 *How. Pr.*, 407; Knapp v. Cur-tiss, 6 *Hill*, 386.

in case there has been an advertisement for claims under the statute, and the representative rejects the claim, the suit must be brought within six months after the demand. Flagg v. Ruden, 1 *Bradf.*, 192.

(g) It is not essential that the offer to refer be in writing; it is good by parol. Lanning v. Swarts, 9 *How. Pr.*, 434. But it must be distinct and unambiguous. Stephenson v. Clark, 12 *Id.*, 282.

(h) The agreement to refer takes the

place, upon the reference, of pleadings in an action, and must state the cause of action sufficiently for this purpose. Woodin v. Bagley, 13 *Wend.*, 452. It is held, however, that the defences which the administrator relies on need not be set up in the agreement to refer. Tracy v. Suidam, 30 *Barb.*, 110.

(i) An agreement "to submit," &c., to the "award" of others, was held not a reference under the statute. Akely v. Akely, 17 *How. Pr.*, 21.

(j) The reference may be to three referees, or to one. *Laws of 1859*, 569, ch. 261.

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Reference of Claim against Executors, &c.

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17. *Approval of the Surrogate, to be indorsed.*

The surrogate of the county of \_\_\_\_\_ hereby approves of  
the persons named as referees in the within agreement.

[Date.]

[Signature.]

Surrogate.

18. *Order of Reference of Claim against Estate. (k)*

[Title of the cause.]

Upon the foregoing agreement between A. B. and Y. Z., executor of the will [or, administrator of the estate, or, administrator with the will annexed] of M. N., to refer the matter in controversy between them in respect to the estate of the said M. N., and upon the approval by the surrogate of the referee [or, referees] therein named.

ORDERED, that the matter in controversy set forth in that agreement be referred to [designating the referees approved by the surrogate] to hear and determine the same.

[Date.]

[Signature.]

Clerk of the county of \_\_\_\_\_

19. *Bond to Executor, &c., before Suing for a Legacy, or Distributive Share. (l)*

KNOW ALL MEN by these presents, that we, A. B., of the town of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of New York, as principal, and C. D. and E. F., both of the town

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(k) This order should be entered in the office of the clerk of the Supreme Court in the county in which the party resides. 2 Rev. Stat., 88, § 36; as amended by Laws of 1859, 569, ch. 261. If the agreement to refer is not filed, and an order of reference entered, the court does not become possessed of the cause. Comstock v. Olmstead, 6 How. Pr., 77.

for they are to be conducted as such 2 Rev. Stat., 89, § 37.

(l) The statute requires a bond to be presented, and a reasonable demand made, before bringing suit; and if the demand is refused, the bond must be filed with the clerk of the court in which the action is to be brought, before the action can be regularly commenced. 2 Rev. Stat., 114, §§ 9, 10. If the claimant is a minor, the guardian, or guardian ad

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 Security before Suit against Executor.
 

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of \_\_\_\_\_, in the county of \_\_\_\_\_, and State aforesaid, as sureties, are held and firmly bound unto Y. Z., executor of the will [*or, administrator of the estate, or, administrator with the will annexed, of the estate*] of M. N., deceased, in the penal sum of [*double the amount of the legacy or share*], to be paid to the said Y. Z., as such executor, or to his successors or assigns; for which payment well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents. Sealed with our seals, and dated the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_.

WHEREAS by the said will of the said M. N., deceased, a legacy of \_\_\_\_\_ dollars, is directed to be paid to the said A. B. [*here state the time when the legacy is directed to be paid*], And whereas, letters testamentary upon said will [*or, letters of administration with the will annexed*] were granted by the surrogate of the county of \_\_\_\_\_, to the said Y. Z., on the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_, being more than one year preceding this date:

[*Or if the claimant is one of the next of kin, insert instead of the preceding paragraph;—Whereas the said A. B. is one of the next of kin of the said M. N., and entitled to share in the distribution of the estate.*]

And whereas as said A. B. demands payment of the said legacy [*or, payment of the said distributive share*], and if such executor [*or, administrator, or, administrator with the will annexed*] should refuse to pay the legacy [*or, said share*], intends to bring an action in the \_\_\_\_\_ court of \_\_\_\_\_, against said Y. Z., as such executor [*or, administrator, or, administrator with the will annexed*], to recover payment thereof.

NOW, THEREFORE, THE CONDITION of this obligation is such, that if, in case any debts owing by the testator [*or, intestate*] shall hereafter be recovered or duly made to appear, for the payment of which, there shall be no assets, other than the said legacy [*or, share*], the said A. B. shall refund the said legacy

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*item*, must also file a bond before the \_\_\_\_\_ an executor or administrator, to recover a specific legacy, the leave of the commencement of the action. *Id.*, surrogate is necessary. 2 Rev. Stat., § 11.

To maintain an action on the bond of \_\_\_\_\_, § 45.



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 Security to Executors, &c., before Suit.
 

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[*or, share*], in case the same shall be paid to him by Y. Z., or be recovered by him in such action, or shall refund such ratable part or proportion thereof, with the other legatees or representatives of the deceased, as may be necessary for the payment of the said debts, and the costs and charges incurred by a recovery against such executor [*or, administrator*] in any suit therefor [*and if the bond be given by a legatee, add, and also if, in case no sufficient assets shall remain after the payment of said legacy to pay any other legacy which may be due, the said A. B. shall refund such ratable part or proportion of the legacy which shall be paid to him by Y. Z. after such demand, or be recovered by him in such action, with the other legatees or other representatives of the deceased, as may be necessary for the payment of the proportional part of such other legacy*];—then this obligation to be void; otherwise to remain in full force and virtue. [*Signatures and seals.*]

In presence of

[*Signature of witness.*]

## 20. Acknowledgment and Justification. (m)

[*Venue.*]

On this                      day of                      18   , before me J. P., a commissioner of deeds, in and for said county, personally appeared A. B., C. D., and E. F., to me known to be the persons described in, and who executed the foregoing bond [*or, A. B., C. D., and E. F., together with G. H., residing in                     , who is to me personally known, who being duly sworn by me, said that he knew A. B., C. D., and E. F., to be the persons described in, and who executed the foregoing bond, which is to me satisfactory evidence thereof*], and the said A. B., C. D., and E. F., severally personally acknowledged that they executed the same.

And the said C. D., of                     , merchant, and E. F., of                     , builder, being duly severally sworn, say each for himself that he is a householder, worth double the amount of

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(m) All bonds given in legal proceedings are required by Rule 6 to be acknowledged or proved like deeds, and any officer approving of sureties must require justification.

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 Securities to Sheriffs, before Suit.
 

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the foregoing bond, exclusive of property exempt from execution, and over and above all demands and liabilities.

J. P.,

Com'r of Deeds.

21. *Approval to be indorsed on the foregoing Bond.*

I hereby approve of the sufficiency of the sureties in the within bond. [Signature by a judge of the court.]

22. *Bond to be given Sheriff before Suing upon Things in Action, &c., taken on an Attachment under the Revised Statutes. (n)*

KNOW ALL MEN by these presents, that we, A. B, of \_\_\_\_\_, C. D., of \_\_\_\_\_, and E. F., of \_\_\_\_\_, are held and firmly bound unto M. N., sheriff of the county of \_\_\_\_\_, in the sum of five hundred dollars, to be paid to the said M. N., his executors, administrators, or assigns, for which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, this \_\_\_\_\_ day of \_\_\_\_\_, in the year \_\_\_\_\_.

WHEREAS, the said sheriff, under an attachment duly issued by \_\_\_\_\_, at the suit of A. B. against W. X., a foreign corporation [or, an absconding, concealed, or non-resident debtor], has seized certain things in action of such corporation [or, debtor], namely, two promissory notes [*describing them, or otherwise stating what suit is necessary to gain possession of the property of the debtor, or to collect his assets.*] And whereas said A. B. is about to commence an action thereon in his own name.

NOW, THEREFORE, the condition of this obligation is such, that if the said A. B. shall well and truly indemnify, and save harmless the said sheriff, M. N., and his deputies, and the persons acting under his or their authority, and each and every of

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(n) *Laws of 1845, 256, ch. 234, § 2.*

## Securities to Sheriff before Suit.

them, against all suits, actions, judgments, executions, troubles, costs, charges, and expenses arising, or which may be had or made against him, them, or any of them, by reason or in consequence of such action, or actions, so to be brought, then this obligation shall be void, otherwise it shall remain in full force and virtue. [Signatures and seals.]

In the presence of

[Signature of witness.]

23. *Proof of Execution.* (o)

[Venue.]

On this                      day of                      in the year                      , before me, J. P., a commissioner of deeds in and for said county, personally came W. X., to me known, who being by me duly sworn [or, where his identity is proved, personally came W. X., together with X. Y., residing in the town of                      who is to me known, who being by me duly sworn said that he knew said W. X. to be the same person who was a subscribing witness to the foregoing bond, which is to me satisfactory evidence thereof. And the said W. X., being by me duly sworn], said that he resides in the town of                      in the county of                      , and that on the                      day of                      , 18                      , he saw A. B., C. D., and E. F. execute the foregoing bond, and that he, said W. X., subscribed his name thereto as witness, and that he knew the said A. B., C. D., and E. F. to be the persons described in, and who executed the same.                      J. P.,  
Com'r of Deeds.

24. *Notice of Justification.* (p)

To M. N., Sheriff.

Please take notice that A. B., named in the foregoing bond, hereby delivers the same to you, before commencing the suit therein mentioned; and that the sureties therein named will attend and justify before                      , at                      , on the                      day of                      , at                      o'clock in the                      noon.

(o) See note (m) *supra*, where also is a form of acknowledgment.

(p) This justification is to be made before any officer entitled to take justification of bail in the court out of which

the attachment issued, upon at least one day's notice in writing to the sheriff. *Laws of 1845*, 256, ch. 234. § 2.

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Undertaking to Sheriff before Suit.

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*25. Justification of Sureties in the foregoing Bond.*

[*Venue.*]

C. D., of \_\_\_\_\_, printer, and E. F., of \_\_\_\_\_, merchant, being duly and severally sworn say, each for himself, that he is a householder, worth double the amount of the foregoing bond exclusive of property exempt from execution, and over and above all demands and liabilities. [Signatures.]

[*Jurat.*]

*26. Undertaking to be given Sheriff before Suing on Things in Action taken by him on Attachment under the Code. (q)*

WHEREAS, M. N., the sheriff of the county of \_\_\_\_\_, by virtue of an attachment issued out of the Court of \_\_\_\_\_, against the property of W. X., in an action against him by A. B., and delivered to said M. N., as sheriff, for execution, has seized certain evidences of debt of said defendant, to wit: [*describe them*]; and whereas, A. B. is about to bring an action [*or, to cause an action to be brought under his direction*] in the Court of \_\_\_\_\_, upon said evidences of debt.

NOW THEREFORE, we [the said A. B. and] C. D., of \_\_\_\_\_, printer, and E. F., of \_\_\_\_\_, merchant, do hereby, pursuant to the statute, undertake that A. B. [the plaintiff], will indemnify the said sheriff from all damages, costs, and expenses on account thereof, not exceeding [*a sum equal to two hundred and fifty dollars for each action to be brought.*] [Signatures.]

[*Acknowledgment, or proof, and Justification, as in the preceding forms.*]

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(q) *Code of Pro.*, § 238. Mr. Justice real party in interest. *Hoffm. Pro.* Hoffman suggests that the action may *Rem.*, 452. be in the name of the plaintiff as the

## Foreign Corporations.

27. *Security for Costs on the Part of a Foreign Corporation Plaintiff.* (r)

KNOW ALL men by these presents, that we, A. B. and C. D. [*designating their residence and additions*], are held and firmly bound unto Y. Z., in the sum of two hundred and fifty dollars, (s) to be paid to the said Y. Z., his executors, administrators, or assigns: For which payment, well and truly to be made, we jointly and severally bind ourselves, our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals, and dated the                      day of                      ,  
186                      .

WHEREAS, the A. Company, a foreign corporation created by the laws of                      , is about to commence an action in the court of                      , against Y. Z., to recover [*here indicate briefly the nature of the cause of action.*]

THE CONDITION of this obligation is such, that if the said A. Company or their successors, shall, on demand, pay to the said Y. Z., his executors, administrators, or assigns, all such costs as may be awarded to the said Y. Z., in such action, then this obligation to be void, else to remain in full force.

Sealed and delivered                      [*Signatures and seals.*]

in presence of                      [*Subscribing witnesses.*]

[*Acknowledgment or proof.* (t) See Forms 20 or 23.]

(r) This is required by 2 *Rev. Stat.*, 457, § 1.

The irregularity of omitting to file security for costs in an action by a foreign corporation may be cured by filing it after a motion to dismiss the proceedings. *Bank of Michigan v. Jessup*, 19 *Wend.* 1. It is cured also by recovering judgment against the defendant. *Merchants' Bank v. Mills*, 3 *E. D. Smith*, 210; and see *Hartford Quarry Co. v. Pendleton*, 4 *Abbotts' Pr.*, 460.

(s) The penalty is fixed at \$250, in analogy to section 20 of the same statute, and according to section 4 of the statute relative to security for costs in other cases. 2 *Rev. Stat.*, 620.

(t) It is not unusual to add a justification, but this is not essential, for the defendants may except, and require a new justification notwithstanding. *Washburne v. Langley*, 16 *Abbotts' Pr.*, 259.

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 Security for Costs.
 

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28. *Notice of filing of Bond.*[*Title of cause.*]

To \_\_\_\_\_, defendant's [attorney].

Sir. Please to take notice, that security for costs, of which the foregoing [*or, within*] is a copy, has been duly executed, and filed in this cause, with the clerk of this court at

[*Date.*][*Signature.*]29. *Security for Costs to be given before Suing in Officer's Name for Statute Penalty. (u)*

WHEREAS, A. B. is about to bring an action against Y. Z., in the name of [*designating the officers*] under and in pursuance of section \_\_\_\_\_, of the act entitled \_\_\_\_\_, passed on the \_\_\_\_\_ day of \_\_\_\_\_ [*or, of section \_\_\_\_\_, of article \_\_\_\_\_, of title \_\_\_\_\_, of chapter \_\_\_\_\_, of part \_\_\_\_\_, of the Revised Statutes, entitled \_\_\_\_\_*].

NOW THEREFORE, A. B. aforesaid, and C. D. and E. F. [*designating their residence and additions*], hereby covenant and agree to and with [*such officer*], that A. B., shall pay all costs on the part of the defendant, as well as on the part of the plaintiffs, if said A. B., shall fail to recover judgment; and that [*naming the persons executing the obligation*] shall and will indemnify and save harmless the said plaintiffs of and from all such costs as aforesaid.

[*Signature and seals.*][*Date.*][*Acknowledgment or proof. See Forms 20 and 23.*]30. *Justification of the Sureties.*

C. D. and E. F., two of the persons named in, and who executed the foregoing obligation, being duly and severally sworn,

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(u) This form, which must be varied according to the statute which requires such security, is supported by *Thayer v. Lewis*, 4 *Den.*, 269; and *Walley v. Leonard*, 2 *How. Pr.*, 282; in the former of which cases it was held that it would be sufficient if there were two

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obligors, but one of them must be the person who prosecutes, and that at least two of the obligors must justify in the sum of \$500 each. The bond should, in general, be filed; and notice given, which may be as in Form 28.

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 Security for Costs. Notice of Judgment.
 

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each for himself, says that he is a resident of the town of \_\_\_\_\_, and a householder [*or*, freeholder], and worth more than \_\_\_\_\_ dollars, over and above all debts, and exclusive of property exempt by law from execution.

[*Jurat.*]

[*Signatures.*]

31. *Notice of Judgment before Swing on Undertaking given on Appeal.*(v)

[*Give usual notice to the adverse party of entry of order or judgment of affirmance, for which, see chapter of APPEALS.*]

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(v) In general, in an action on an undertaking in the usual form, which does not in terms call for notice to the sureties of affirmance, nor for demand of payment, it is not necessary to aver or prove notice or demand. *Heebner v. Townsend*, 8 *Abbotts' Pr.*, 234. The plaintiffs are not bound to exhaust the remedy on the judgment before bringing an action on an undertaking, given before its recovery, for its payment if it should be recovered. *Nickerson v. Chatterton*, 7 *Cal.*, 568. But by section 348 of the *Code of Procedure*, as amended by the *Laws of 1862*, ch. 460,

no action lies upon any undertaking, given under that section of the Code of Procedure on appeal in the Supreme Court, or New York Superior Court, or Common Pleas, from a single judge to the court at general term, until ten days after service of notice on the adverse party of the entry of the order or judgment affirming the judgment appealed from.

This applies to undertakings given before the statute; but it does not apply to special security required by the court. *Rice v. Whitlock*, 16 *Abbotts' Pr.*, 225.

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 Authority to bring Ejectment.
 

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## CHAPTER III.

## ATTORNEY'S AUTHORITY.

[It is proper, though not necessary, for an attorney to require written authority to commence an action. (a) The court will not in general inquire into his authority, although it be challenged by the defendant; (b) but in the case of an action to recover lands, or ejectment, (c) and in all actions in justices' courts, he may be required to prove his authority.]

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34. Notice of the same .....	23
35. Acknowledgment to be indorsed on authority to sue in justice's court. .	23

32. *Request to commence Ejectment. (d)*

I hereby request [*or, if the suit has been already commenced,* hereby recognize the authority of] C. D., of , as, my attorney, to bring an action in the courts of the State of New York, in my name, to recover possession of [*here designate real property in question*], with full power to prosecute the same.

[Date.]

[Signature.](e)

(a) *Bogardus v. Livingston*, 7 *Abbotts' Pr.*, 428; *Howard v. Howard*, 11 *How. Pr.*, 80; 2 *Rev. Stat.*, 351, § 26.

(b) *The Ninety-nine Plaintiffs v. Vanderbilt*, 1 *Abbotts' Pr.*, 143; *Republic of Mexico v. Arrangois*, 5 *Duer*, 643; affirming S. C., 1 *Abbotts' Pr.*, 437; *Commissioners of Excise v. Purdy*, 13 *Id.*, 434. Compare *State v. Tighman*, 6 *Clarke (Iowa)*, 496.

(c) Leave to sue for the possession of lands, in the name of the People, is to be obtained from the attorney-general, on giving security for costs. 1 *Rev. Stat.*, 180, §§ 10, 11.

(d) The defendant may require the production of the attorney's authority, and stay proceedings meanwhile. 2 *Rev. Stat.*, 305; *Howard v. Howard*, 11 *How. Pr.*, 80. The defendant's application will be dismissed with costs if it appears that he was served with the attorney's affidavit of his authority as above. The form of the writing is not at all material.

(e) A mere general agent for taking possession and managing land is not empowered by such agency to give the attorney authority to sue. *Howard v. Howard*, 11 *How. Pr.*, 80.



Proof of.

Acknowledgment of Power

33. *Attorney's Affidavit thereto.*[*Title of cause.*][*Venue.*]

C. D., of \_\_\_\_\_, attorney-at-law, being duly sworn, says that he has written authority from A. B., the plaintiff in this action, to bring such action, of which authority the above is a copy [*or*, which authority is contained in a letter from the plaintiff, an extract from which is hereto annexed]; that the said writing was duly signed and delivered [*or*, sent by mail] to this deponent by the plaintiff [*or*, by M. N., an agent of the plaintiff, duly authorized thereto, as appears by a letter of the plaintiff to said M. N. hereto annexed.] [Signature.]

[*Jurat.*]34. *Notice of the Same. (f)*[*Title of the cause.*]

To Y. Z., the defendant above named.

SIR:—Take notice that the within is a copy of the affidavit of the plaintiff's attorney herein, showing his authority to bring this action. [Signature.]

[*Date.*]35. *Acknowledgment to be Indorsed on Authority to sue in Justice's Court. (g)*[*Venue.*]

On this \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, before me personally came A. B. [and C. D.], to me known to be the persons

(f) It is well to serve such notice and authority voluntarily, where it is supposed that the defendant might seek delay by moving for a production of it.

(g) In a justice's court a party authorized to appear by attorney may appoint any person to act as such attorney; but the authority of the attorney, which may be either written or verbal, must in all cases be proved, either by the attorney himself or other

competent testimony, unless admitted by the opposite party. 2 *Rev. Stat.*, 233, §§ 44, 45. It is held, however, that the omission to object at the trial to the authority of one appearing as attorney, is an admission of his authority within the meaning of the statute. *Ackerman v. Finch*, 15 *Wend.*, 652; and in *Treadwell v. Bruder* (3 *E. D. Smith*, 596), it was held, that the objection that the authority of the agent to appear was not shown, is no

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Acknowledgment of Power.

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described in, and who executed the within [*or, above, or, annexed*] power of attorney [*or other written authority to sue*], and acknowledged [each for himself] that he executed the same.

[*Signature of officer.*] (h)

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ground for a nonsuit after the plaintiff's case is proved; for a production of the authority should be demanded at the time of the appearance.

(h) Any written authority to appear by attorney in a justice's court may be acknowledged before any judge of the

County Courts, justice of the peace, or commissioner of deeds; but the officer shall not take the same unless he shall know the person making it; and the certificate of such acknowledgment shall state that the officer knows such person. *Laws of 1831, 356; ch. 287.*

## CHAPTER IV.

## LEAVE OF COURT TO SUE.

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 Leave for Receiver to sue.
 

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## I. LEAVE FOR ACTIONS BY OR AGAINST RECEIVERS OR OTHER TRUSTEES.

 36. *Petition by a Receiver, or other Trustee, for leave to sue. (a)*

[*Title of the action or other proceeding in which the petitioner was appointed.*]

To the Supreme Court of the State of New York [*or other court whose officer he is*].

The petition of A. B. respectfully shows :

I. That on the                      day of                      18                      , at                      , upon application made by O. P., a judgment-creditor of M. N., in proceedings supplementary to execution upon his judgment, the petitioner was, by an order duly made by Hon.                      , one of the justices of the                      court [*or, county judge for the county of*], duly appointed receiver of the property of M. N. (b)

II. [*State briefly the cause, or causes, of action, as they would be stated in a concise complaint.*]

III. That the petitioner is informed and believes that there is due thereupon from said Y. Z. [*the intended defendant*], to the estate [*or, fund*] of which the petitioner is receiver, the sum of                      , [*or other relief*].

IV. That the petitioner has demanded payment of said Y. Z. [*the intended defendant*], but he refuses to pay the same.

*Or, if it is a case of special relief of a nature to require demand*, has requested the said Y. Z. to desist from such grievances [*or, to deliver said property*], but he refuses so to do.

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(a) By the former practice, one reason why a receiver was required to obtain leave before suing at law was, that he must sue in the name of others, and the court would require him to indemnify such nominal plaintiffs. *Green v. Winter*, 1 *Johns. Ch.*, 60. Under the Code of Procedure, § 111, and the *Laws of 1832*, 509, ch. 295; and *Laws of 1845*, 91, ch. 112, a receiver may sue in his own name (see, also, *Laws of 1858*, 506, ch. 314); and even the real party in interest is not necessarily liable for the costs. *Wheeler v. Wright*, 14 *Abbotts' Pr.*, 353; *McHarg v. Donnelly*, 27 *Barb.*, 100. Another reason

was, that the sanction of the court was desirable in order to shield him from a personal liability for costs, in case his suit was unsuccessful. This reason is still operative. See *Code of Pro.*, § 317. *Phelps v. Cole*, 3 *Code R.*, 157; *Smith v. Woodruff*, 6 *Abbotts' Pr.*, 65; *Murray v. Hendrickson*, *Id.*, 96. But a special application is necessary to charge him with the costs. *Marsh v. Hussey*, 4 *Bosw.*, 614. And he is sometimes required to give the defendant security for costs.

(b) For an allegation suited to the case of a receiver appointed pending an action see Form No. 39, *infra*.

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 Actions by Receivers.
 

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V. That the petitioner, upon diligent inquiry, is informed and believes that said Y. Z. is solvent, and the demand is collectible from him by means of an action [*or, believes that the said chattels are now in the possession of said Y. Z., and may be recovered by proceedings of claim and delivery [replevin], or, otherwise show that an action would be successful*].

Wherefore your petitioner asks leave to bring an action, as such receiver, in this court [*or other appropriate tribunal*] against said Y. Z., to recover said debt [*or other relief*].

[*Date.*]

[*Signature.*]

[*Verification.*]

### 37. Order giving Receiver leave to sue.

[*Title of the cause or matter.*]

[*At a special term, &c.*]

On reading and filing the petition of A. B., the receiver in this suit [*or, matter*], asking for leave to bring an action for a debt amounting to \_\_\_\_\_, due from Y. Z., of \_\_\_\_\_, [*and if the action is to be brought in the name of a third person, (c) add, and of proof of service of a copy of said petition, and of notice of motion thereon upon said C. D., in whose name the proposed action is to be brought; and the said C. D. not appearing to oppose*]; and this court deeming such petition to contain sufficient evidence to authorize such action;—on motion of Q. R., of counsel for the said receiver: ORDERED, that the said A. B., as such receiver, is hereby authorized and directed to commence and prosecute an action in one of the courts of record of the State of New York, and in such form as counsel may advise, against the said Y. Z., to recover the said debt of \_\_\_\_\_, [*and if the action is to be brought in the name of a third person, and security for costs is required, add, and that such action be brought and prosecuted in the name of the said C. D. as plaintiff. But the said receiver is first to execute a bond, as such receiver, to the said C. D., therein binding the estate and effects committed to his trust as receiver, by way of indemnity to the said C. D., against the damages, costs, and charges which may, by possibility, accrue to the said C. D. as*

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(c) In such case it is proper to give of the application. This form is from the proposed nominal plaintiff notice *Edwards on Receivers*, 139.

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 Leave for Actions by Committee.
 

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nominal plaintiff, or to his estate or effects, by nonsuit, damages, motion, costs, or otherwise, in or on account of such action or the verdict therein. The said bond being first approved, in amount and form, by S. C., Esquire, as referee, residing in the city of New York [*or*, by a justice of this court], and the said bond being also filed, but without any report being necessary from the said referee, before such action is commenced. And this court does not deem it necessary that any particular sum in the receiver's hands should be expressly set apart or paid into court merely to meet the possibility of damages, costs and charges falling on the nominal plaintiff in such action].

38. *Petition of Committee of Lunatic, &c., for Leave to sue. (d)*

To the Supreme Court [*or*, to the County Court of the county of \_\_\_\_\_], of the State of New York.

The petition of A. B. respectfully shows :

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, upon proceedings duly instituted in this court [in and for the county of \_\_\_\_\_], and by an inquisition then taken and returned, M. N. was found and adjudged to be an idiot [*or*, a lunatic, *or*, a person of unsound mind, *or*, to be incapable of conducting his own affairs, in consequence of habitual drunkenness].

II. [*Here state the cause of action on which the petitioner desires to sue, as it would be stated in a concise complaint.*]

III. That the petitioner is informed and believes that there is now due thereupon from said Y. Z. [*the intended defendant*], to the said M. N. [*the lunatic*], the sum of \_\_\_\_\_ dollars.

IV. That the petitioner has demanded payment of said Y. Z., but he refuses to pay the same.

V. That the petitioner, upon diligent inquiry, is informed and believes that Y. Z. is solvent [*or*, that said mortgage is collectible in whole or in part], and that the action is necessary to enforce the same, and protect the rights of said M. N.

Wherefore your petitioner asks leave to bring an action as such committee [*continue as in Form 36*].

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(d) As to when the action should be made in a lunatic's name, and not in that of his committee, see *Petrie v. Shoemaker*, 24 *Wend.*, 85; *Lane v. Schermerhorn*, 1 *Hill*, 97; *McKillip v. McKillip*, 8 *Barb.*, 552.

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 Petition for Suit against Receiver.
 

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39. *Petition for Leave to sue a Receiver, or other Trustee.*

To the Supreme Court of the State of New York [*or, other court whose officer the receiver is*].

The petition of A. B. shows :

I. That on the                      day of                      , 18                      , at                      , in an action then pending in the Court of                      , wherein M. N. was plaintiff and O. P. was defendant, upon an application made by M. N., Y. Z. was, by an order then duly made by said court [*or, by Hon.                      , a judge of said court*], appointed receiver of [*here designate the fund or estate*].

II. [*State briefly the cause of action so far as it concerns the receiver, as would be done in a concise complaint*].

III. That said receiver now has the possession of said property [*or, claims some interest in said mortgaged premises, or, otherwise show the necessity of joining him as a party*].

IV. That the petitioner has demanded of him that he deliver the said property [*or other redress, where a demand is proper*], but he refuses to do so.

V. That your petitioner has fully and fairly stated the case to O. P., his counsel, who resides at                      , in the                      , and that he has a good, substantial, and meritorious cause of action thereupon against said receiver [*or, a good, substantial, and meritorious cause of action thereupon, and that said receiver is a necessary or proper party-defendant to his action thereupon*], as he is advised by his said counsel after such statement, and verily believes.

Wherefore your petitioner asks that the said receiver may be ordered to pay the amount so due, with the costs of this application, or that the petitioner have leave to bring an action against him to recover the same [*or, if he is to be joined incidentally to relief sought against others, asks that he may have leave to join said receiver as defendant in an action to be brought by him against W. X., upon the foregoing facts*]; and for such other and further relief as may be just.

[*Date.*]

[*Signature.*]

[*Verification.*]

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 Petition of Creditor of Lunatic.
 

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## II. LEAVE FOR ACTIONS BY OR AGAINST LUNATICS, ETC.

40. *Petition for Leave to sue a Lunatic, &c.*

To the Supreme Court of the State of New York.

The petition of A. B. shows:

I. That on the                      day of                      18                      , upon proceedings duly instituted in this court, in and for the county of                      , [*or, instituted in the County Court of* ], and by an inquisition then taken and returned, Y. Z. of                      , was found and adjudged to be an idiot [*or, a lunatic, or, a person of unsound mind, or, to be incapable of conducting his own affairs in consequence of habitual drunkenness*]; and thereupon M. N., of                      , was, by an order of said court duly made on the                      day of                      , 18                      , at                      , appointed the committee of said Y. Z.

II. That on the                      day of                      , 18                      , and, as the petitioner is informed and believes, before said Y. Z. became a lunatic, he became indebted to the petitioner [*here state grounds of indebtedness, annexing and referring to a copy of the instrument, if any, on which it is founded*].

[*Or, if the claim is for a tort.*—II. That on the                      day of                      , 18                      , the said Y. Z. assaulted and beat [*here state the cause of action as in a concise complaint, showing moreover that actual damage was sustained by the petitioner*].

[*Or, if the demand is upon an executed contract, made in ignorance of the lunacy of the defendant.*—II. That on the day of                      , 18                      , the petitioner was employed by said Y. Z., and rendered services, and furnished materials in the building of a house for said Y. Z., upon his farm at                      , [*or other consideration received by the lunatic*]; and that the petitioner, without any knowledge of the lunacy [*or, idiocy*] of Y. Z., and in good faith, rendered such services, and furnished such materials, an account of which is hereto annexed; and that Y. Z. is now justly indebted to the petitioner thereon in the sum of                      .]

III. That the petitioner has presented this demand to said M. N., the committee of Y. Z., for payment out of the estate of Y. Z., but that said committee refuses to pay the same.

IV. That the petitioner has fully and fairly stated the case



## Action against Lunatic.

in this matter to O. P., his counsel, who resides at \_\_\_\_\_, in the \_\_\_\_\_; and that he has a good, substantial, and meritorious cause of action thereupon, as he is advised by his said counsel, after such statement made as aforesaid, and verily believes to be true.

Wherefore your petitioner asks that the said committee may be ordered to pay the amount(e) so due, with the costs of this application, or that the petitioner have leave to bring an action against Y. Z. to recover the same; and for such other and further relief as may be just.

[*Or, where the lunatic is made a party, incidentally to relief sought chiefly against others.* Wherefore, your petitioner asks that he may have leave to join the lunatic as a defendant in the action to be brought by the petitioner thereupon, and for such other and further relief as may be just.] [Signature.]

[Date.]

[Verification.]

## 41. Order for Leave to sue a Lunatic, &amp;c.

In the Matter of the petition  
of  
A. B.

At a special term of the Supreme Court, held in and for the county of \_\_\_\_\_, [or, at a term of the County Court of the county of \_\_\_\_\_, held] at the, &c., on, &c.

Present,

Hon.

Justice [or, Judge].

On reading and filing the petition of A. B., dated on, &c., for an order that M. N., the committee of the person and estate of Y. Z., pay the demands therein set forth, or that the petitioner

(e) It is generally the preferable course to dispose of the petition by reference of the claim, without direct- ing an action to be brought. *Williams v. Estate of Cameron*, 26 Barb., 172; *Hall v. Taylor*, 8 How. Pr., 428.

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Leave to Sue to Annul Charter.

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have leave to bring an action thereon [*or*, for an order that the petitioner have leave to bring an action against Y. Z. to recover his damages for the grievances therein alleged; *or*, that the petitioner have leave to join Y. Z. as a defendant in an action to be brought by him, as therein set forth]; and on reading and filing proof of the service of said petition upon the committee, and after hearing Q. R., of counsel for the petitioner, and S. T., of counsel for the committee, it is—

ORDERED, that the petitioner, A. B., have leave to bring an action in this court [*or*, *designate other appropriate tribunal*] against said Y. Z., upon the grounds of action mentioned in the petition [*or*, leave to join Y. Z. as defendant in the action to be brought by him, on the grounds mentioned in the petition]. (f)

### III. LEAVE FOR ACTION IN NATURE OF QUO WARRANTO.

#### 42. *Application by Attorney-general (g) for Leave to sue to Annul a Charter.*

To the Supreme Court of the State of New York [*or*, to the Hon. \_\_\_\_\_, justice of the Supreme Court].

The attorney-general of the State of New York respectfully shows :

I. That the \_\_\_\_\_ Company is a corporation which was created by the Legislature of this State on or about the day of \_\_\_\_\_, 18 [here state the mode of the incorporation and its purpose, showing that it is not a municipal corporation].

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(f) An order requiring the committee to pay, or an order referring the claim, if that course is adopted, may easily be framed pursuant to the prayer of the petition, and the form of the foregoing order.

(g) The court may, in its discretion, order the application to stand over until notice is given to the corporation or its officers, that they may be heard. (§ 431.)

If there are circumstances in the case which render this notice unnecessary,

they should be stated in the application.

The Code (§ 432) authorizes the attorney-general to sue for the usurpation of a corporate power or of a public office, or to vacate letters-patent, in certain cases, without requiring him to obtain leave.

As to the cases in which leave was granted under the former rule, see *People v. Sweeting*, 2 *Johns.*, 184; *People v. Loomis*, 8 *Wend.*, 396; *People v. Tibbits*, 4 *Cow.*, 358.

## In FORMÂ PAUPERIS.

II. That it has not organized, and commenced the transaction of its business, although more than one year has elapsed from the time it became a corporation; on the contrary [*here set forth facts substantiating this allegation*].

III. That it has thereby forfeited its privileges and franchises by failing to exercise its powers. (*h*)

IV. That he has reason to believe that the foregoing allegations can be established by proof.

Wherefore he asks leave to bring an action in the name of the People of the State, for the purpose of vacating the charter and annulling the existence of the corporation.

[*Date.*]

[*Signature.*]

## IV. LEAVE TO SUE IN FORMÂ PAUPERIS.

43. *Petition for Leave to Prosecute as a Poor Person.* (*i*)

[*If presented after suit is brought, entitle it in the cause.*]

To the Supreme Court of the State of New York.

The petition of A. B. shows :

I. That he has a cause of action (*j*) against Y. Z., arising on the following facts [*here state facts sufficient to show the nature of the suit, and that it is a meritorious cause of action*].

II. That your petitioner is desirous to commence an action against said Y. Z. thereon [*or, that your petitioner has commenced an action against said Y. Z. thereon, stating the condition of the cause*]. (*k*)

(*h*) Or, in place of these paragraphs, state in a similar way other facts constituting grounds of dissolution specified in section 430 of the Code of Procedure.

(*i*) Under 2 *Rev. Stat.*, 444.

(*j*) One of several plaintiffs cannot have leave to prosecute as a poor person. *Ostrander v. Harper*, 14 *How. Pr.*, 16. A married woman may have such leave, either when suing for a separation from her husband, *Robertson v. Robertson*, 3 *Paige*, 387, or when suing

for injuries to her person or to her separate property. *Roberti v. Carlton*, 18 *How. Pr.*, 416.

(*k*) Delay is a ground of denying the petition. *Florence v. Bulkley*, 1 *Duer*, 705; *Ostrander v. Harper*, 14 *How. Pr.*, 16. It will not be granted to enable one to bring error or appeal. *Moore v. Cooley*, 2 *Hill*, 412; *Ostrander v. Harper*, 14 *How. Pr.*, 16; but see *Whelan v. Whelan*, 3 *Cow.*, 534, 537, where the Court of Errors granted it on an appeal.

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Leave to Sue in Formâ Pauperis.

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III. That your petitioner is not worth twenty dollars, excepting the wearing apparel [and furniture] (*l*) necessary for himself [and his family], (*l*) and excepting the subject-matter of the action; and is unable to prosecute such action unless admitted to do so as a poor person.

Wherefore he asks leave to prosecute said action, as a poor person, against Y. Z.; and that the court will assign him attorney and counsel for that purpose. [Signature.]

[Date.]

[Verification.] (*m*)

44. *Certificate of Counsel.* (*n*)

I hereby certify that I have examined the claim referred to in the preceding petition, and am of the opinion that the petitioner has a good cause of action in the premises.

[Date.]

[Signature of counsel.]

45. *Order giving Leave to Prosecute as a Poor Person.*

In the matter of the petition of A. B. [ <i>or, if suit is already pending,</i> <i>title of the cause.</i> ]
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[At a special term, &c.]

On reading and filing the petition of A. B. for leave to prosecute as a poor person, and to have attorney and counsel assigned to conduct the action, and on hearing P. Q. for the petitioner [and R. S. of counsel for the defence opposed]:\*

ORDERED, that the petitioner be admitted to prosecute as a

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(*l*) Omit, if he has no furniture and family.

(*m*) The clause alleging poverty, which under the old practice was inserted in the verification, is unnecessary under the statute, because its equivalent is now inserted in the body

of the petition. See, also, 3 *Moult. Pr* 474.

(*n*) If the motion is made after the suit has been commenced, notice of it must be given to the adverse party. *Thomas v. Wilson*, 6 *Hill*, 257; *Ostrander v. Harper*, 14 *How. Pr.* 16.

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 Order upon Petition. Leave to bring Partition.
 

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poor person, and shall have assigned to him counsel, attorneys, and all other officers requisite for prosecuting his suit, who shall do their duty therein without taking any reward for the same; and it is further ordered, that \_\_\_\_\_ is hereby assigned to him as attorney and counsel for that purpose.

46. *Order denying Leave to Prosecute as a Poor Person.*

*As in preceding form to the \** And it appearing that this motion has been unreasonably delayed until after the cause has been at issue, and noticed for trial [*or, that the cause has already proceeded to a hearing, upon the defendant's demurrer to the petitioner's complaint, and that the demurrer has been sustained by the court*]:

ORDERED, that the petition be denied.

47. *Order for Reference of Petition for Leave to Prosecute as a Poor Person.*

*As in Form No. 45 to the \**

ORDERED, that it be referred to G. H., Esq., a counsellor of this court, to examine into the circumstances of the case set forth in said petition, and to report whether, in his opinion, the said petitioner has a meritorious cause of action against the said Y. Z, which is cognizable in this court, and whether he is entitled to prosecute the same as a poor person. And it is further ordered, that if the said referee is satisfied that such petitioner is entitled to prosecute as a poor person, and has reasonable grounds for bringing an action in this court, he do also report the name of a suitable person to be assigned as his attorney and counsel to prosecute such action.

V. LEAVE FOR INFANT TO BRING PARTITION SUIT.

48. *Petition of Infant or Guardian.*

To the Supreme Court of the State of New York.

The petition of A. B., an infant, of the age of \_\_\_\_\_ years  
 [*and, if under the age of fourteen years, add, by G. H., his*  
 general guardian], shows:

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 Petition of Infant for Leave to bring Partition.
 

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I. That the petitioner [*or, if the petition is by guardian, said infant*] was of the age of                years on the                day of               , last, and resides at               , with C. B., his father [*or, otherwise show in what custody his person is*].

II. That he is one of the children and heirs-at-law of the late M. N., deceased, of               , who died leaving certain real estate in               , to wit [*briefly describing it*].

III. That the petitioner [*or, said infant*], as such heir-at-law, is now a tenant in common [*or, joint-tenant*] of said land, together with the other children and heirs-at-law of M. N. [*or, otherwise state the title in the infant which enables him to ask for the partition*].

IV. That the value of said land is about                dollars; and the share of the petitioner [*or, of said infant*] in the same is, according to the best information and belief of the petitioner, worth about the sum of                dollars.

V. [*Where the necessities of the infant are a ground of the petition.*] That the petitioner [*or, said infant*] has no other real estate than that hereinbefore mentioned [*except, &c.*], (o) and that he has no other property of any kind, except about                dollars, which is in the hands of his general guardian, invested by him [*or, otherwise state the situation of the fund, if any*], the income of which is insufficient for his support [*and education*].

VI. [*Where the unproductiveness of the estate is a ground of the petition.*] That the real property hereinbefore mentioned consists of building-lots in the suburbs of the village of               , and is wholly unproductive. [*Or, consists of several lots in               , on which are wooden buildings constructed many years ago, and now absolutely requiring expensive repairs in order to render them productive of an income to the owners, which repairs cannot be made in behalf of the petitioner [*or, said infant*] with advantage or with economy, and that he has not the means to bear his share of the necessary expense.*] [*Or, consists of a lot in the city of               , upon which there was heretofore a warehouse, which has been destroyed by fire. And that the lease under which the same was occupied has expired, and that the same is now unproductive of any income,*

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 Petition setting forth Necessity for Partition.
 

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and its expenses are a burden upon the owners, and it cannot be rendered productive without rebuilding at a great expense, which cannot be done advantageously and economically for the petitioner, and he has not the means to bear his share of the necessary expense.] [*Or, otherwise according to the fact.*]

VII. [*Where disagreement among the co-tenants is a ground of the application.*] That W. X., one of the co-tenants of the petitioner [*or, of said infant*] assumes to control and manage the property and collect the rents, and that unhappy differences have arisen between him, and O. P., and the petitioner, in respect to his conduct of the same, and of his accounting for the proceeds, which differences are to the great prejudice of the rights of the petitioner [*or, of said infant*], and he has been unable to avoid or to reconcile the same with due regard to said rights.

VIII. [*Where the burdens of the property are a ground of the application.*] That said property consists of a lot of ground in the city of \_\_\_\_\_, which has recently been assessed by the Corporation of the city, in the sum of \_\_\_\_\_ dollars, for benefit arising from a local improvement in said city; and that no damages have been awarded to him for the same [*or, that the award of damages for the same is only \_\_\_\_\_ dollars*], and that said assessment for benefit, has not been paid; and your petitioner [*or, said infant*] has not the means of paying his share thereof; and the land is so situated, and of such small area, that a part cannot be set off and sold to satisfy the charge.

[*Or, VIII.* That the taxes and assessments for the years \_\_\_\_\_ and \_\_\_\_\_ have not been paid; and the taxes and assessments for the year \_\_\_\_\_, were paid by the co-tenants of the petitioner [*or, of said infant*], who demand repayment of his share; and that the land is liable to be sold for the taxes and assessments still unpaid, and it is so situated, and of such small area, that a part cannot be set off and sold for payment of the charge.]

IX. That the interests of your petitioner, as he is informed and believes [*or, of said infant, as the petitioner is informed and believes*], require a partition [*or, a sale*] of the premises.

X. That W. X., one of the co-tenants above named, refuses to unite with the others in a sale of the premises [*or, has left this State, and his place of residence is unknown to the petitioner, and cannot after diligent inquiry be ascertained; or,*

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 Petition for Leave to bring Partition.
 

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that all the other co-tenants above named are infants, under the age of 21 years].

XI. That the petitioner has applied to each of the other co-tenants above named [except U. V., who is an infant; *or*, who has left this State, and whose residence the petitioner cannot ascertain], to induce some of them to purchase the share of your petitioner [*or*, of said infant], but they all decline to do so. (*p*)

Wherefore your petitioner asks that the court authorize proceedings to be instituted on his behalf [*or*, on behalf of such infant, *or*, would authorize the petitioner—*or*, said infant—to unite with C. D., in instituting proceedings], (*q*) for the division and partition of said real estate, and for a sale thereof, in case it appears that such partition cannot be made without great prejudice to the owners; (*r*) [and that \_\_\_\_\_, who is a competent and responsible person, may be appointed as the guardian, or next friend, of said infant, to conduct such proceedings on his behalf.] [Signature.]

[Date.]

[Signature of witness, if the petition is to be proved instead of acknowledged.]

#### 49. Verification of foregoing Petition.

[Venue.]

A. B. [*the infant, or if he is under fourteen, the guardian*], being duly sworn, says, that he has read [*or*, heard read] the foregoing petition subscribed by him, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

[Jurat.]

[Signature.]

(*p*) The application should show that the interest of the infants cannot be sold for their full value without a partition. Matter of Marsac, 15 *How. Pr.*, 383.

(*q*) Leave should be sought where the infant joins with others, as well as when he is sole plaintiff. Clark v.

Clark, 14 *Abbotts' Pr.*, 299; S. C., 21 *How. Pr.*, 479.

(*r*) Where the action is to be brought in the Supreme Court, it will be most convenient to unite in the petition for leave to sue this request for the appointment of a guardian *ad litem*. See chapter of GUARDIAN AD LITEM, *infra*



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 Partition by Infant.
 

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50. *Consent of Proposed Guardian.*

I hereby consent to become the guardian *ad litem* of A. B.,  
in the above action.

[Signature.]

[Date.]

51. *Proof of Signatures. (s)*

[Venue.]

On this            day of           , 18   , before me personally came  
the above-named           , to me personally known to be the  
person whose name is subscribed to the above petition as wit-  
ness thereto, who, being by me sworn, did say, that he resides  
in           , and that on            he saw said [*petitioner*  
*and guardian*], to him personally known to be the petitioner de-  
scribed in the foregoing petition, and the proposed guardian  
therein named, sign the petition and consent respectively.

[Signature of officer.]

52. *Another Form, by Acknowledgment. (t)*

[Venue.]

On this            day of           , 18   , before me ap-  
peared           , to me personally known to be the infant,  
and the proposed guardian, described in, and who executed, the  
foregoing petition and consent, and severally acknowledged  
that they respectively executed the same.

[Signature of officer.]

53. *Order of Reference.*

Supreme Court, County of           .

In the matter of the petition of  
A. B., an infant [by his guar-  
dian].

[At a special term, &amp;c.]

(s) The signatures should be proved.  
The omission of such proof from the  
record does not, however, affect the  
validity of the proceedings. *Varian v.*  
*Stevens*, 2 *Duer*, 635.

(t) For another form of acknowledg-  
ment by the guardian, and proof by his  
oath to the signature of the infant,  
together with proof of his responsibil-  
ity, see Form No. 70 *infra*.

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 Referee's Report on Petition for Leave to sue.
 

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On reading and filing the annexed verified petition of A. B., an infant [*or*, of G. H., guardian of A. B., an infant], and on motion of Q. R., his attorney : (*u*)

ORDERED, that it be referred to R. S., counsellor-at-law, or , to inquire into the matters set forth in the petition, and report the facts to the court, with his opinion thereon.

### 54. *Report of Referee.*

[*Title of the matter.*]

To the Supreme Court of the State of New York.

The undersigned, referee, to whom it was referred by the order of this court, made at , on the day of , 18 , to inquire into the matters set forth in the petition herein, and report the facts to the court with my opinion thereon, respectfully REPORT:

I. That I have been attended on said examination by of , [and by the witnesses whose affidavits are hereto annexed].

II. That after due examination and inquiry I find that the facts stated in the petition are substantially true.

III. That the petitioner [*or*, said A. B.] is an infant of the age of , and is a tenant in common [*or*, joint-tenant] with said Y. Z. [*here set forth concisely the estate, and the title of the parties*].

IV. That the petitioner [*or*, said A. B.] is in need of an income from the value of his share in said property, for his maintenance [and education]; but that the condition of the property is such, that without its sale [*or*, partition] it will not produce such income [*or, otherwise state concisely the ground for a partition, setting out the circumstances*].

V. *State in the same way that the sale cannot be had without such proceeding.* (*v*)

VI. Upon these facts, I am of opinion that the interests of the

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(*u*) The reference may be *ex parte*.  
2 *Van Santo. Pr.*, 9.

(*v*) The facts which the referee relies on as making it proper to allow a suit

to be brought must be stated in his report. It is not enough to state his opinion. *Matter of Marsac*, 15 *How. Pr.*, 383.

## In Partition by Infant.

infant in the premises require that an action should be brought for a partition and sale [*or*, for a partition] of said estate.

VII. [*If the appointment of a guardian "ad litem" was also sought and referred, add*, I further report that G. H., who was proposed as guardian *ad litem* for said infant, is a responsible person [and is the general guardian of the infant], and is fully competent to understand and protect the rights of the infant, and has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party; and that he is of sufficient ability to answer to the infant for any damage which may be sustained by his negligence or misconduct in the defence or prosecution of the suit, and is a suitable and proper person to be appointed.]

All of which is respectfully submitted. [Signature.]

[Date.]

## 55. Order granting Leave, and appointing Guardian.

[Title of the cause.]

[At a special term, &c.]

On reading and filing the report of R. S., referee appointed by the order of court, made in this matter on the day of                   , 18   , which report bears date on the day of                   , 18   ; and it having been made satisfactorily to appear thereby that the interests of such infant require a partition or sale; [and that G. H. is a competent and responsible person to be appointed guardian] :

ORDERED, that said report be confirmed, and that the court hereby authorize proceedings to be instituted by action in this court [*or*, in the Court of                   ], on behalf of such infant, [*or*, authorize said infant to unite with                    in an action] for a division and partition of such real estate, and for a sale thereof, if it shall appear that such partition cannot be made without great prejudice to the owners.

[*If the petition was also for the appointment of a guardian ad litem, add*, on his executing to the People of this State, and duly acknowledging and filing a bond in the penalty of                    dollars [*to be fixed by the court*], and with [*one or more sureties, as the court may direct*] to be approved by a justice of this court, conditioned for the faithful discharge of the trust com-

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 Leave to sue on Bond in Court.
 

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mitted to such guardian, and to render a just and true account of his guardianship, in all courts and places when thereunto required.

[*Bond of guardian, and approval, as in forms in chapter of*  
 GUARDIANS AD LITEM.]

VI. LEAVE TO SUE ON A BOND GIVEN AS CONDITION OF A FAVOR  
 GRANTED BY THE COURT. (*w*)

56. *Affidavit of Applicant.*

[*Title of the cause in which*  
*the bond was given.*]

Y. Z., one of the defendants in this action, being duly sworn, says:

I. That heretofore the defendants in this action moved the court for a stay of proceedings in this action until a decision of an appeal from a judgment against them herein, which was then pending in the Court of Appeals; upon which motion the court [*or, Hon.*                      , a judge of                      ], on the day of                      , at                      , duly made an order that all proceedings in this action should be stayed until the decision of said appeal, unless the plaintiff, A. B., should, within days, execute a bond with two sureties to the defendants, conditioned to make restitution to this deponent of any money

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(*w*) Where a bond is conditioned that the party will pay, &c., when the court should order it, an order to pay is necessary. *Carpenter v. Aeby, Hoffm.*, 311. The order should be made on notice to the party, but may be made without notice to the sureties; and an order made at special term is an order of "the court" for this purpose. *Dickerson v. Cook*, 3 *Duer*, 324. In *Harris v. Hardy*, 3 *Hill*, 393, it was said that an order will be granted directing the sureties to pay the money into court, or, in default thereof, that a suit be brought upon the bond (citing 1 *Meriv.*, 49, 51; 2 *Wadd. (N. Pr.)*, 230). A bond placed on file cannot be removed with-

out the leave of the court, and if the plaintiff sues upon it without the authority of the court, the remedy for such irregularity is by motion to set aside the proceedings. *Higgins v. Allen*, 6 *How. Pr.*, 30; and see *Harris v. Hardy*, 3 *Hill*, 393. This rule, however, was disapproved in *N. Y. Central Ins. Co. v. Safford*, 10 *How. Pr.*, 344, where it was held in respect to an undertaking given under the Code of Procedure, that as soon as a party has a right of action on such an undertaking filed, he may sue upon it without leave of court; it being his property, although he has no right to remove it from the files without leave.

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 Action on Bond in Court.
 

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which should be collected by proceedings in this action, in case the judgment appealed from as aforesaid should be reversed.

II. That on or about the \_\_\_\_\_ day of \_\_\_\_\_, the plaintiff executed a bond with C. D. and E. F., as his sureties, according to the requirement of the said order, and filed the same with the clerk of this court, and gave notice thereof to this defendant. (x)

III. That thereupon he proceeded on said judgment, and collected from this defendant by execution thereon, the sum of \_\_\_\_\_ dollars.

IV. That thereafter, and on or about the \_\_\_\_\_ day of \_\_\_\_\_, the judgment so appealed from was duly reversed on said appeal by the Court of Appeals; but that court did not make or order any restitution of the property or rights lost to this deponent by the erroneous judgment.

V. That the plaintiff and his sureties have not made restitution of the money so collected by him, but the plaintiff has refused to do so although duly requested. [Signature.]

[Jurat.]

[Notice to the plaintiff of the motion.]

57. *Order that the Bond be delivered up to be Sued.*

[Title of cause.]

[At a special term, &c.]

On reading and filing the affidavit of Y. Z., hereto annexed, and proof of service of notice of this application, and on motion of Q. R., his counsel:

ORDERED [that the plaintiff or his sureties pay the amount thereof into court within \_\_\_\_\_ days after service of a copy of this order, and on proof of their default], that the bond of A. B., C. D., and E. F., mentioned in said affidavit, be delivered by the clerk to Y. Z., for prosecution.

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(x) A bond required to be given as a condition of a favor granted by the court is properly delivered by filing it with the clerk, and giving notice to the party. *Rice v. Whitlock*, 15 *Abbotts' Pr.*, 419.

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 Actions on Official Bonds.
 

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## VII. LEAVE TO SUE ON BOND OF SHERIFF OR OTHER OFFICER.

58. *Application for Leave to sue on Sheriff's Bond (y) for Wrongful Levy.*

To the Supreme Court of the State of New York.

The petition of A. B. shows :

I. That Y. Z. is sheriff of the county of \_\_\_\_\_, in this State.

II. That upon entering upon his office [*or other time, according to the fact*] he executed with W. and X., his sureties, a joint and several bond to the People of this State, conditioned that he should well and faithfully perform and execute his office of sheriff without fraud, deceit, or oppression ; a certified copy of which bond is hereto annexed.

III. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, an attachment was duly issued at the suit of one M. against the property of one O., as an absconding, concealed, and non-resident debtor, and was duly delivered to Y. Z., as such sheriff, to be executed.

IV. That Y. Z., by virtue of that attachment claimed to seize, and did seize, the property of this applicant.

V. That this applicant claimed it again from the said sheriff, who thereupon summoned a jury to try the claim ; and the jury, upon an inquisition, duly found that the same belonged to this applicant.

VI. That thereupon the attaching creditor M. indemnified Y. Z. for the detention thereof, whereby he was required as such sheriff to detain the same, and he did so detain it, to the damage of this applicant \_\_\_\_\_ dollars.

VII. That this applicant sued Y. Z., the sheriff, for so seizing and detaining his goods, and recovered judgment against him for the sum of \_\_\_\_\_ dollars, on which execution has been issued and returned wholly unsatisfied, and that as the appli-

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(y) Leave to sue upon the official bonds of sheriffs, surrogates, the clerk of the city and county of New York, and marshals of cities, is required by 2 *Rev. Stat.*, 476. This form is based on *People v. Schuyler*, 4 *N. Y. (4 Comst.)*, 173. As to leave to sue a bond given by sheriff to be released from attachment, see *People v. Acker*, 20 *Wend.* 612.

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 Sheriff's Bonds.
 

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cant is informed, and believes, Y. Z. is insolvent and unable to respond in damages. (z)

Wherefore the applicant asks leave to prosecute the bond of the sheriff in this court, to recover his damages in the premises, and for such other or further order as may be just.

[Date.]

[Signature.]

[ Verification. ]

59. *The Same in Case of Neglect to pay over Money on Execution.*

[Allege official character and bond, as in the preceding form.]

III. That on the                      day of                      , 18    , an execution was duly issued against the property [or, the person] of one M., and in favor of this applicant upon a judgment for the sum of                      dollars, theretofore duly recovered by this applicant against said M., in the Court of                      , which execution was by this applicant directed and delivered to Y. Z., as such sheriff, to be executed.

IV. That as the applicant is informed and believes, Y. Z., as such sheriff, collected and received thereupon to the use of this applicant, the sum of                      dollars, besides his fees and poundage.

V. That although more than sixty days have elapsed after the delivery of said execution to Y. Z., and that the petitioner did on the                      day of                      , at                      , demand of him that he pay over the same, he has, in violation of his duty, wholly failed to do so. (a)

Wherefore the applicant asks leave to prosecute the bond of the sheriff in this court, to recover his damages in the premises, and for such other or further order as may be just.

[Date.]

[Signature.]

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(z) In the exercise of the discretion conferred by the statute, the court will require the applicant to show by affidavit or otherwise, that the sheriff is individually unable to respond in damages. *Anderson v. Hitchcock*, 2 *Wend.*, 299. But a recovery against him is not essential. *Exp. Chester*, 5 *Hill*, 555.

(a) On an application for leave to sue the bond of a sheriff for neglect to pay over money, a demand upon the sheriff must be alleged. *Rhineland v. Mather*, 5 *Wend.*, 102.

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 Leave to sue Official Bonds.
 

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60. *Order granting Leave to sue on Official Bond.*

Supreme Court of the  
State of New York.

[*At a special term, &c.*]

In the matter of the application of A. B.
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On reading and filing the annexed petition of A. B., dated on the            day of           , 18   , and a certified copy of the official bond of Y. Z., and on motion of Q. R., counsel for the applicant,

ORDERED, that A. B. be authorized to prosecute Y. Z., and W. and X. as sureties, in this court, in the name of the People of this State, stating in the process, pleadings, and proceedings, required in such action, That the same is brought on the relation of the applicant.

## VIII. LEAVE TO SUE ON ADMINISTRATION BOND. (b)

61. *Application to the Surrogate.*

To the Surrogate of            county.

The petition of A. B. of            shows,

I. That he is a creditor of M. N., late of           , deceased, and has a valid claim against his estate, and that upon his petition as such creditor [*or, otherwise*], the surrogate of           , on or about the            day of           , 18   , at           , made a decree requiring that Y. Z., (c) to whom letters of administration [*with the will annexed*] [*or, letters testamentary*] upon

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(b) As to the distinction between the several cases in which the surrogate may order the bond of an executor or administrator to be prosecuted, see *People v. Corlies*, 1 *Sandf.*, 228. This form is under *Laws of 1830*, 320, § 23; same statute, 2 *Rev. Stat.*, 116, § 19.

For the form of an application and order directing an administration bond to be *assigned*, see *Baggott v. Boulger*, 2 *Duer*, 160.

(c) The decree or order to pay may be against one of several co-executors or administrators, although the bond is joint. *People v. Downing*, 4 *Sandf.*, 189



## Bonds of Executors and Administrators.

said estate had been granted by the surrogate of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, should, within \_\_\_\_\_ days, render an account of his proceedings, or pay the same [*or, otherwise state briefly the object of the decree made*].

*Or, where the applicant seeks payment of a legacy, substitute, for the first part of the foregoing paragraph, I. That he is a legatee under the will of the late M. N. of \_\_\_\_\_, and entitled to the payment of a legacy given him thereby; and that upon his petition [continue as above].*

*Or, where the applicant seeks payment of a distributive share, I. That he is one of the next of kin of M. N., late of \_\_\_\_\_, deceased, and entitled to the payment of his distributive share of the estate; and that upon his petition [continue as above].*

II. That said Y. Z. has refused to perform said decree, and has not rendered an account [*or, has not paid the same*], although on the \_\_\_\_\_ day of \_\_\_\_\_, at \_\_\_\_\_, he had due notice of said decree, and was requested so to do. (*d*)

Wherefore your petitioner asks that the surrogate will cause the bond given by said Y. Z., as administrator of the estate of M. N., on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, for the faithful execution of his trust, and for his obedience to all orders of the surrogate touching the administration of the estate, to be prosecuted; and apply the moneys collected in satisfaction of such decree in the same manner as the same ought to have been applied by him. [Signature.]

[ Verification. ]

62. *Order directing an Administration Bond to be prosecuted.*

At a Surrogate's Court

held at the, &c., on, &c.

Present

Hon. \_\_\_\_\_

, Surrogate.

(*d*) There may be cases where the surrogate may proceed to order a prosecution of the bond, without any previous service on the executor or administrator of a copy of the decree, or, of the summons to show cause, and without any demand that he perform the decree. *People v. Rowland*, 5 Barb., 449.

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 Order to sue on Bond ;—on Judgment.
 

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In the Matter of the Estate of M. N.	}
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On reading and filing the petition of the above-named A. B., setting forth a decree made in this court on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, whereby Y. Z., as executor [*or, administrator*] of M. N., deceased, was decreed to [*here state the thing directed to be done, as in the petition*], and that said Y. Z., although he had due notice of the decree, and has been requested to perform the same, has refused so to do [*or, other breach*]; now on motion of counsel for said A. B.,

ORDERED, that the bond given by said Y. Z. [*describing it as above*], be prosecuted by said A. B., in the name of the People of this State, joining his name as relator; (e) and that the moneys collected therein, in satisfaction of such decree, be applied in the same manner as the same ought to have been applied by said Y. Z.

## IX. LEAVE TO SUE ON A JUDGMENT. (f)

## 63. Affidavit of Applicant.

[*Name of court whose judgment it is, and of parties.*]

A. B., the plaintiff [*or, defendant*] in this action, being duly sworn, says,

(e) It seems to be the better practice to bring such suits as this, in which the People are trustees of an express trust, but not interested in the event, in the name of the People (*People v. Norton*, 9 *N. Y. (5 Sel.)*, 176), with the name of the beneficiary, or one of them, if there are many, joined as relator. See 1 *Rev. Stat.*, 179, § 1; *People v. Laws*, 4 *Abbotts' Pr.*, 292. In some cases the surrogate might, under the statute, make a different order.

Where the bond is assigned to be prosecuted, the action may be in the name of the assignee. *Baggott v. Boul-*

*ger*, 2 *Duer*, 160; *People v. Laws*, 3 *Abbotts' Pr.*, 450.

(f) This leave is necessary in the case of all judgments except those of justices (*Code of Pro.*, § 71); but assignees and the representatives of deceased parties are not "the same parties," and need not seek leave; and creditors' suits are not deemed actions on judgments within the meaning of the statute. Judgments of the Marine or District Courts of the city of New York, and justices' judgments which have been docketed in the office of the county clerk, thus becoming in legal

Affidavit to obtain.

I. That on the                      day of                      , 18                      , he recovered judgment for the sum of                      dollars, in this action against Y. Z. above named, which judgment remains wholly unsatisfied.

[*Or, where the judgment is a justice's judgment, docketed.*]

I. That on the                      day of                      , in an action before J. P., a justice of the peace in and for the town of                      , the deponent recovered judgment against the above-named                      , for the sum of                      dollars, of which judgment, thereafter, and on the                      day of                      , a transcript was duly filed in the office of the clerk of the county of                      , whereby said judgment became a judgment of the County Court.]

II. That after issuing execution thereon, and its return unsatisfied, the deponent commenced proceedings supplementary to execution to enforce its payment.

III. That upon motion of the defendant above named, and on affidavits produced by him, setting forth and alleging a discharge in insolvency theretofore obtained by him, said defendant procured an order that the said supplementary proceedings be set aside.

IV. That said discharge is void for the following reasons [*or, otherwise allege the grounds relied on to elude its effect as against the plaintiff*].

V. That the deponent has fully and fairly stated the case to R., his counsel in this action, who resides at                      , in the                      , and that he has a good, substantial, and meritorious cause of action upon the said judgment, any thing alleged by the defendant to the contrary notwithstanding, as he is advised by his said counsel, after such statement, and verily believes.

[*Jurat.*]

[*Signature.*]

effect judgments of the County Court or Court of Common Pleas, are not within the exception. *Thompson v. Sutphen*, 2 *E. D. Smith*, 527; *Mills v. Winslow*, *Id.*, 18; *Lyon v. Manly*, 10 *Abbotts' Pr.*, 337.

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Leave to sue on Judgment.

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64. *Notice of Motion.*

[*Title of cause.*]

To Y. Z., defendant above named.

Take notice that upon the affidavit, a copy of which is annexed, and upon the pleadings and proceedings in this action, the plaintiff will move this court, at a special term, to be held at \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, that the plaintiff have leave to bring an action against you upon the judgment therein mentioned, and for such other relief as may be just.

[*Signature.*]<sup>1</sup>

[*Date.*]

65. *Order granting Leave to sue on a Judgment.*

[*Title of cause.*]

[*At a special term, &c.*]

On reading and filing the annexed affidavit of A. B., and notice of motion, and proof of due service thereof, and on hearing Q., of counsel for plaintiff, and R., of counsel for the defendant [*or, no one appearing to oppose*] :

ORDERED, that the above-named plaintiff have leave to bring an action against the defendant, upon the judgment mentioned in said affidavit.

## Actions by Infants.

## CHAPTER V.

## APPOINTMENT OF GUARDIAN AD LITEM.

[An infant cannot sue in his own name. (a) Nor can his general guardian sue for him without a special appointment. (b) By the present practice he must first apply to the court, or a judge of the court, in which he would sue, for the appointment of a suitable person as guardian *ad litem* or next friend, to appear with him for the purposes of the proceeding. (c) This application must be made by the infant if he is of the age of fourteen, if not, then by his general guardian, or some relative or friend. (d)]

(a) This is a general rule, resting on the disabilities and immunities of infancy. The provision of 2 *Rev. Stat.*, 446, § 2, that no suit shall be brought by an infant as sole plaintiff, was not at law extended to suits by an infant and an adult jointly (*Hulbut v. Newell*, 4 *How. Pr.*, 93. Compare *Foxwish v. Tremaine*, 2 *Saund.*, 213, case 41); but it was so extended in Chancery (*Matter of Frits*, 2 *Paige*, 374); and the *Code of Pro.* (§ 115), adopts the latter rule, by providing that when an infant is a party, he must appear by guardian.

(b) *Hoyt v. Hilton*, 2 *Edw.*, 203.

(c) Under the Code of Procedure if an action be commenced by a next friend, instead of a guardian *ad litem*, it is irregular. *Hoftailing v. Teal*, 11 *How. Pr.*, 188. The act of 1852, relating to partition, which uses the term "next friend," should not be regarded as affecting this change. *Croghan v. Livingston*, 6 *Abbotts' Pr.*, 350.

The application when made by or on behalf of an infant plaintiff, must be made before the commencement of the action. *Wilder v. Ember*, 12 *Wend.*, 191. And where an appointment after the date of the summons and of the verification of the complaint, is irregular. *Hill v. Thaxter*, 3 *How. Pr.*, 407.

Generally, an officer of the court, other than attorneys, will not be ap-

pointed guardian of an infant plaintiff. *McVickar v. Constable*, *Hopk.*, 102. But it is otherwise as to the guardian of an infant defendant. *Rule* 61. But compare *Fitch v. Fitch*, 18 *Wend.*, 513.

The only remedy, however, where an infant sues without the appointment of a guardian, is to move before answering that the proceedings be set aside, or to plead the plaintiff's infancy in abatement. A plea to the merits alone is a waiver of the objection. *Fellows v. Niver*, 18 *Wend.*, 563; *Grah. Pr.*, 190; *Schermerhorn v. Jenkins*, 7 *Johns.*, 373; but see *Exp. Scott*, 1 *Conn.*, 33. As to time of making the application for infant defendant, and effect of neglecting so to do, see *Code*, § 116; and *McConnell v. Adams*, 1 *Code R., N. S.*, 114.

(d) The chief objects of the appointment are, that the interests of the infant may be intelligently pursued, and that the defendant may have a responsible person to look to for the proper conduct of the action, and for the payment of costs. The guardian is therefore a party to the action in such sense as to affect his admissibility as a witness (*Hahn v. Van Doren*, 1 *E. D. Smith*, 411), and to allow him to verify the pleadings (*Anable v. Anable*, 24 *How. Pr.*, 92); but not in such sense as to make him an insufficient surety in a bond in the suit (*Anonymous*, 2

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 Actions by and against Infants, &c.
 

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Having done this, he may commence an action, and the proceedings may be signed by an attorney as in other cases. (e)

Where an infant is a defendant, (f) it is essential that a guardian *ad litem* should be appointed for him after service of the process, and before proceeding to issue. (g)

For convenience of presenting the whole subject together, both cases are treated in this chapter; although that of the infant defendant is one that arises after the proceedings treated in the following chapter.

Where an infant is a married woman it has been customary to appoint her husband, if he has no interest adverse to her, and is competent in other respects.]

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*Hill*, 417), nor to make the judgment bind his individual rights. *Darrin v. Hatfield*, *Seld. Notes*, 1, 36; S. C., 4 *Abbotts' N. Y. Dig.*, 243.

(e) *People v. New York C. P.*, 11 *Wend.*, 164; *Hill v. Thaxter*, 3 *How. Pr.*, 407.

(f) The power to appoint a guardian *ad litem* for an infant defendant rests upon general principles, and is incident to the administration of justice in any court. *Brick's Estate*, 15 *Abbotts' Pr.*, 12.

(g) Judgment rendered against an infant for want of an answer, and without the appointment of a guardian *ad litem*, is irregular, and will be set aside on motion, and without imposing terms. *Kellogg v. Klock*, 2 *Code R.*, 28. But where the plaintiff was ignorant of the defendant's infancy until after judgment, a guardian has been appointed pending

an appeal from the judgment. *Moody v. Gleason*, 7 *Cow.*, 482. See *Fish v. Ferris*, 3 *E. D. Smith*, 567. The guardian may be appointed by a justice of the peace in an action pending in his court. *Mockey v. Grey*, 2 *Johns.*, 192. As to proceedings for the appointment of guardians in the district courts of the city of New York, see *Laws of 1857*. Whether the provision of section 114 of the Code, that no guardian or next friend is necessary in an action by a married woman, is applicable where the married woman is an infant; whether it was the intention of the Legislature to do any thing more than abolish the disability occasioned by coverture, is questionable. As to the cases in which the husband's appointment of an attorney for both is sufficient, see *Cook v. Rawdon*, 6 *How. Pr.*, 233.

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## I. APPOINTMENT OF GUARDIAN AD LITEM FOR PLAINTIFF.

66. *Petition of Infant Plaintiff over fourteen.*

To the \_\_\_\_\_ court [*or*, To Hon. \_\_\_\_\_, Judge of  
the \_\_\_\_\_ court].

The petition of A. B., an infant, shows

I. That your petitioner was of the age of \_\_\_\_\_ years on the \_\_\_\_\_ day of \_\_\_\_\_ last; and is the only minor child of C. B. deceased, and resides with his mother at \_\_\_\_\_, and that he has no general guardian appointed pursuant to law [or, otherwise show what guardianship the petitioner has].

II. *State the cause of action briefly, for instance as follows:*  
That said C. B. died on the \_\_\_\_\_ day of \_\_\_\_\_, seized

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 Plaintiff's Application for Guardian.
 

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in fee simple of certain premises [*describing them briefly*] which were leased by the said C. B. at the time of his death to one Y. Z. That said C. B., by his last will, devised said premises to your petitioner and his brother, D. B., in equal undivided moities. That said Y. Z. is now indebted to your petitioner and the said D. B. in the sum of one hundred dollars, rent of said premises accrued since the death of C. B. aforesaid. That your petitioner is desirous of commencing with said D. B. an action against Y. Z. for the recovery of said rent, and your petitioner is, as he is advised, a necessary party plaintiff to such action.

That M. N., the uncle of your petitioner, of \_\_\_\_\_, is worth, as your petitioner is informed and believes, at least the sum of five hundred dollars, over and above all just debts and liabilities, and is a competent and responsible person to become the guardian of your petitioner in such action. (*h*)

Wherefore your petitioner asks that M. N., or some other competent person, may be appointed guardian *ad litem* of your petitioner to commence and carry on such action for your petitioner. [Signature.]

[Date.]

### 67. Verification.

[Venue.]

A. B., being duly sworn, says, that he has read [*or, heard read*] the foregoing petition, subscribed by him, and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters therein stated on information and belief, and as to those matters he believes it to be true.

[*Jurat.*]

[Signature.]

### 68. Consent of Proposed Guardian. (*i*)

I hereby consent to become the guardian of A. B., to bring the action above referred to. [Signature.]

[Date.]

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(*h*) Guardian for plaintiff need not be the general guardian or officer of the court. *Cook v Rawdon*, 6 *How. Pr.*, 233.

See, also, as to proof of competency, Form 70, and note *l, infra*.

(*i*) The written consent of the guardian is an essential prerequisite to his



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 For Infant Plaintiff in Partition.
 

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69. *Petition, &c., in Partition Cases. (j)*

To the Supreme Court of the State of New York [or, other court].

The petition of A. B., an infant, shows to this court,

That he was of the age of \_\_\_\_\_ years on the day of \_\_\_\_\_ last. That he is about to commence an action in this court against Y. Z., and others, for partition of lands, of which the parties are joint-tenants [or, tenants in common], pursuant to leave granted by the Supreme Court, by an order made at a special term held at \_\_\_\_\_, on the day of \_\_\_\_\_, 18 \_\_\_\_\_. That your petitioner resides with his father C. B., in \_\_\_\_\_, and that M. N., of \_\_\_\_\_, is his general guardian [or, otherwise state what guardianship the party has].

Wherefore your petitioner asks that said M. N., who is a competent and responsible person, be appointed his guardian *ad litem*, for the purposes of this action. [Signature.]

[Jurat.]

[Verification, and Consent of guardian, as above.]

70. *Proof of Signatures to Petition for Appointment of Guardian for Plaintiff, and of Guardian's Competency. (k)*

[Venue.]

M. N., being duly sworn says, that he is acquainted with the handwriting of A. B., petitioner above named, that the signa-

appointment. *McVickar v. Constable, Hopk., 102.*

(j) A guardian *ad litem*, to institute for an infant an action for partition of lands, is not appointed in the same manner as in other actions. He can be appointed by *the court only*, and the appointment of a guardian *ad litem* for an infant plaintiff by a county judge in an action for partition in another court, is a nullity. *Lyle v. Smith, 13 How. Pr., 104; Varian v. Stevens, 2 Duer, 635; Disbrow v. Folger, 5 Abbotts' Pr., 53.*

The act of 1852 requires the application for a guardian or next friend to be made according to the *Rev. Stat.*, pt. 3, ch. 1, &c., which is a clerical error, for ch. 5. The provisions of 2 *Rev. Stat.*, 317, §§ 2-4, are what are intended.

The most convenient method is to apply for the appointment of a guardian on the application for leave to bring the action, and a form for this purpose will be found in the preceding chapter, *Ante*, 39.

(k) For other forms of proof of signature, see *Ante*, 39.

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 Plaintiff's Application for Guardian.
 

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ture to the above petition is in the handwriting of said A. B., and the signature to the annexed consent is in the handwriting of deponent.

Deponent further says, that he resides in the State of New York, to wit, at \_\_\_\_\_, and is worth \_\_\_\_\_ dollars over and above all his debts and liabilities, and property exempt by law from execution; (b) that he is the general guardian of the petitioner [or, of the infant above named, or, that he is an attorney and counsellor of this court.] That he is, fully competent to understand and protect the rights of the infant, and has no interest adverse to that of the infant, and is not connected in business with the attorney or counsel of the adverse party or any of them. (m) [Signature.]

[Jurat.]

### 71. Order appointing Guardian ad litem for Infant Plaintiff.

[Name of the court.]

In the matter of the petition of A. B.,  
an infant, for the appointment of  
a guardian *ad litem*.

} At a special term, &c. (n)

(b) Formerly any person might bring an action in the name, and as next friend, of an infant, even without his knowledge. *Fulton v. Roosevelt*, 1 *Paige*, 178. The Revised Statutes, however, provided that the next friend must be a competent and responsible person. 2 *Rev. Stat.*, 446, § 2. And these provisions are still applicable under the Code. *Ten Broeck v. Reynolds*, 13 *How. Pr.*, 462. Both under the old practice, and under the Code, the next friend, or guardian as now called, would be removed if irresponsible, and the proceedings dismissed on the defendant's motion, unless a competent and responsible person were substituted. *Fulton v. Roosevelt*, *supra*; *Dalrymple v. Lamb*, 3 *Wend.*, 424; *Ten Broeck v. Reynolds*, *supra*; *Cook v. Rawdon*, 6 *How. Pr.*, 233; and

see Supreme Court Rules, 60; *Lawrence v. Lawrence*, 3 *Paige*, 267; *Robertson v. Robertson*, *Id.*, 387. If the guardian is a non-resident he may be required to give security for costs. *Ten Broeck v. Reynolds*, *supra*. It therefore seems the better practice, though not essential, especially where a reference is to be ordered, to show on the application in the first instance that the guardian is a resident.

(m) The competency of the proposed guardian must now be shown by affidavit, upon the application. This is required by Rule 61 of 1870, amending the former rule of 1858. And this applies to all actions.

(n) This order may be made at chambers or by a county judge (*Code*, § 115) instead of at special term, except in partition cases.

On Behalf of Plaintiff.	Order.	Bond of Guardian.
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On reading and filing the annexed petition of A. B., for the appointment of \_\_\_\_\_ as his guardian *ad litem*, and the consent of said \_\_\_\_\_, [and it being made satisfactorily to appear to the court that said \_\_\_\_\_ is a competent and responsible person]:\* (o)

ORDERED, that \_\_\_\_\_ be and hereby is appointed guardian *ad litem* of A. B., infant above named, and authorized to prosecute for him as such guardian, the action mentioned in the annexed petition [*in partition cases, add, on his executing† to the People of this State, and duly acknowledging and filing, a bond in the penalty of \_\_\_\_\_ dollars [to be fixed by the court], and with \_\_\_\_\_ sureties [one or more, as the court may direct], to be approved by a justice of this court, conditioned for the faithful discharge of the trust committed to such guardian, and to render a just and true account of his guardianship, in all courts and places when thereunto required].*

## 72. Bond of Guardian *ad litem* for Infant Plaintiff in Partition.

Know all men by these presents, that we, M. N., of \_\_\_\_\_, merchant, and E. F., physician, and G. H., merchant, of the same place, are held and firmly bound into the People of the State of New York, in the penal sum of \_\_\_\_\_ dollars, for which sum well and truly to be paid, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents. Sealed with our seals, and dated the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_.

Whereas, by an order made by the \_\_\_\_\_ Court, on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_, at \_\_\_\_\_, said M. N. was appointed guardian *ad litem* of A. B., infant, of \_\_\_\_\_, to conduct, on the part of said infant, proceedings to be instituted on his behalf [together with \_\_\_\_\_, co-plaintiffs], for a division and partition, or sale of the real estate mentioned in the petition upon which said order was made; said guardian being required to give security.

Now, therefore, the condition of this obligation is such that if the said M. N. shall faithfully discharge the trust committed

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(o) The clause in brackets will not be necessary in ordinary actions. Rule 60

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Petition on Behalf of Plaintiff.

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to him as such guardian, and render a just and true account thereof in all courts and places when thereunto required, then this obligation to be void, otherwise to remain in full force.

Sealed and delivered [Signatures and seals.]  
in presence of

[Acknowledgment or proof, and Justification of sureties.] (p)

73. *Approval to be Indorsed.*

I approve of the within bond as to the form and manner of execution, and as to the sufficiency of the sureties.

[Date.] [Signature of judge.]

74. *Petition by General Guardian, or Relative, or Friend, for appointment of Guardian ad litem for Infant Plaintiff under Fourteen.* (q)

To the Court.

The petition of G. H., respectfully shows :

I. That your petitioner is the testamentary guardian of A. B., an infant under fourteen years of age, duly appointed by the will of C. B., his father [or, is the general guardian of A. B., an infant under the age of fourteen years, duly appointed such on the day of , 18 , by the order of M. N., surrogate of the county of , or, is the father, or, other relative of A. B., an infant under the age of fourteen years].

II. That said A. B. was years old on the day of last, and resides at , with the petitioner.

III. *Set forth concisely the cause of action.*

IV. That your petitioner is desirous of bringing an action to recover the amount due on the foregoing facts [or, to foreclose the said mortgage, or, stating other relief sought], on behalf of said A. B.

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(p) The sureties must justify, and of fourteen, the application for the ap-  
the bond must be acknowledged like a pointment of a guardian must be made  
deed. Rule 6. See Forms 20 and by his general or testamentary guar-  
23. dian, or by a relative or friend. Code,

(q) When the infant is under the age § 116.

## Application by Relative or Friend of Plaintiff.

[If the petitioner seeks appointment of himself, add, that your petitioner is willing to become the guardian *ad litem* of said A. B., and that he is worth, adding allegations of competence, as in Form 70.]

Wherefore your petitioner asks that he may be appointed [or, that F. G., who resides at \_\_\_\_\_, in this State, and who is a competent and responsible person, and worth \_\_\_\_\_ dollars over all his debts and liabilities, and property exempt by law from execution, may be appointed] guardian *ad litem* of said A. B., to prosecute said action for him. [Signature.]

[Verification. If the proposed guardian is another than the petitioner, add his Consent; and, also, Proof of Signature, unless he is an attorney.]

75. Notice of foregoing Application by Relative or Friend  
[Name of court.]

In the matter of the petition of C.  
D. for the appointment of a guardian *ad litem* for A. B., an infant.

To \_\_\_\_\_ .(r) Take notice that on the annexed petition [consent, and affidavits] an application will be made to this court, at a special term thereof, to be held at \_\_\_\_\_; on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_ o'clock in the forenoon, for an order appointing E. F. guardian *ad litem* of A. B., infant above-named, and authorizing him to prosecute the action referred to in said petition. [Signature.]  
[Date.]

(r) This notice must be given to the general or testamentary guardian of the infant if he has one, if not, to the person with whom he resides. Code, § 116. If the application is made by the person with whom he lives, and he has no guardian, that fact should appear by the petition.

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Defendant's Application for Guardian ad litem.

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II. APPOINTMENT OF GUARDIAN AD LITEM FOR THE DEFENDANT,  
UPON AN APPLICATION ON HIS OWN BEHALF.

76. *Petition by Infant Defendant for the Appointment of a  
Guardian ad litem.*

[*Title of the cause.*]

To Honorable \_\_\_\_\_, one of the justices of the  
Court.

The petitioner, Y. Z., one of the defendants above named,  
respectfully shows,

I. That an action has been commenced (s) against your pe-  
titioner in this court by A. B. [*here state object of the action*].

II. That your petitioner is an infant of the age of \_\_\_\_\_  
years on the \_\_\_\_\_ day of \_\_\_\_\_ last, and resides with  
his father at \_\_\_\_\_, and that \_\_\_\_\_ is his general  
guardian.

III. That twenty days have not elapsed since the service of  
the summons upon the petitioner [*or, that no application for  
appointment of guardian ad litem to appear on behalf of your  
petitioner, in said action, has been made, to the best of your pe-  
titioner's knowledge and belief*]. (t)

Wherefore your petitioner asks that G. H. may be appointed  
his guardian *ad litem*, to appear and defend said action on his  
behalf. [*Signature.*]

[*Verification, Consent of proposed guardian, and Proof of  
competency, as in preceding forms.*]

77. *Order Appointing Guardian.*

[*As in Form 72 to the \*.*]

ORDERED, that \_\_\_\_\_ be and hereby is appointed guar-

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(s) Service of the summons on the applicant need not be shown. It is enough that the action has been commenced, and he is a party. *Varian v. Stevens*, 2 *Duer*, 635; *Althause v. Radde*, 3 *Bosw.*, 410.

(t) After the expiration of twenty days from the service of summons the infant may still apply, unless forestalled by an application by the adverse party. *McConnell v. Adams*, 3 *Sandf.*, 728; S. C., 1 *Code R.*, N. S., 114.

## Applications on Behalf of Defendant.

dian *ad litem* for the petitioner, and authorized and directed to appear and defend on his behalf the action mentioned therein. (u)

78. *Petition by an Infant Defendant in Partition.*

[*Title of the cause.*]

To the Court.

The petition of Y. Z., one of the defendants above named shows :

I. That this action has been commenced against the petitioner and others, by service of a summons upon this petitioner [*or, upon W. X.; one of the defendants*], for a partition or sale of real estate situate in , the value of which is, as your petitioner is informed and believes, about dollars. That your petitioner's interest in the same is , [*or, of the value of about dollars*].

II. That your petitioner is an infant of the age of years on the day of last, and that he resides with W. B., his father, and that he has no general or testamentary guardian [*or, otherwise state what guardianship he has*].

III. That twenty days have not elapsed since the service of the summons on your petitioner [*or, that no guardian ad litem has been appointed for your petitioner*] in this action, to the best of his knowledge and belief.

Wherefore your petitioner asks that G. H., of , his said general guardian [*or, an attorney and counsellor of this court*], and a competent and responsible person, be appointed his guardian *ad litem*, and authorized and directed to appear and defend said action in his behalf. [*Signature.*]

[*Verification, Consent of Guardian, Proof of Signature, and of Competency, as in preceding forms.*]

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(u) This order, together with the place of trial in the action is laid, and petition, should be filed in the office of notice thereof should be served on the the clerk of the county where the attorney of the plaintiff





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 Petition on Behalf of Defendant.
 

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defendants above named]. That the object of the action is [here state it concisely].

II. That the defendant Y. Z. is an infant,                      years old on the                      day of                      last [and if he is over fourteen years, add, and has neglected to apply for the appointment of a guardian *ad litem* in this action]. That he resides with the petitioner, who is his father, and that he has no general guardian [or, otherwise state what guardianship he has].

Wherefore your petitioner asks that a guardian *ad litem* be appointed to appear and defend said action, on behalf of the infant. [Signature.]

[Verification, &c., &c., as in preceding forms.](w)

## 82. Petition of Relative of Lunatic Defendant.

[Title of the cause.]

The petition of M. N. respectfully shows :

I. That an action has been commenced in this court, between the parties above named, by the issue of summons, and the service thereof on some of the defendants.

II. That Y. Z., one of the defendants above named, is a lunatic, and totally incapable of putting in his answer, or conducting any business whatever.

III. That he is of full age, viz., about                      years, and has no committee, and that he resides with the petitioner, who is his father, and is under the petitioner's control and custody.

IV. That your petitioner has no interest adverse to the rights of said Y. Z., and is not connected in business with the attorney or counsel of the adverse party. (x)

Wherefore your petitioner asks that he may be appointed the guardian of said Y. Z., for the purposes of this action, and for such other or further order as may be just. [Signature.]

[Verification, and Notice if necessary, (y) and Order, similar to preceding forms.]

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(w) Notice of this application must be given. *Code*, § 116.

(x) This allegation is not necessary in ordinary actions. *Rule* 60.

(y) This application must be on no-

tice to the plaintiff, unless the lunacy of the defendant is alleged in the complaint. *Heller v. Heller*, 6 *How. Pr.* 194.

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Petition by Plaintiff for Guardian for Defendant.

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83. *Petition of Guardian of a Lunatic Defendant in Partition.* (z)

[*Title of the cause.*]

To the Supreme Court of the State of New York :

The petition of W. J. M. of W. county, Ohio, the guardian of S. M., an [infant] idiot [about twenty years of age], respectfully shows :

That an action has been commenced against your petitioner's ward and others, in the Supreme Court of the State of New York, by A. B., for partition of certain premises lately owned by M. N., deceased, situated in the city of New York, for a particular description of which premises reference is made to the complaint of the plaintiffs. That your petitioner's said ward is a [an infant] lunatic, and is now residing with your petitioner [or, is now under the custody and charge of your petitioner].

Wherefore the petitioner asks that S. J. of the city of New York, counsellor-at-law, may be appointed the guardian of your petitioner's ward in the defence of said action.

[*Add statement as to his competency and responsibility, as in preceding forms.*]

[*Signature.*]

[*Date.*]

[*Verification, &c., &c., as in preceding forms.*](a)

III. APPOINTMENT OF GUARDIAN FOR THE DEFENDANT UPON AN APPLICATION BY THE PLAINTIFF.

84. *Notice to Defendant or his Guardian, that Plaintiff will apply.* (b)

[*Title of cause, &c.*]

To Y. Z., one of the defendants. (c)

Take notice, that unless you procure the appointment of a guardian *ad litem*, to appear and defend this action on your behalf, within twenty days from the service of the summons

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(z) This form is supported by Rogers v. McLean, 11 *Abbotts' Pr.*, 440.

be necessary to give notice to other resident minors. 2 *Rev. Stat.*, 317, § 2.

(a) If the action is for partition, and the petitioner is also an infant, it may

(b) The appointment of a guardian *ad litem* for a defendant, when made

## Plaintiff's Motion.

herein upon you [*or*, unless the defendant Y. Z. procures the appointment of a guardian *ad litem* to appear and defend this action on his behalf within twenty days from the                      day of                      18                      , the date of the service of the summons herein upon him], an application will be made to this court at a special term thereof, to be held [*or*, to Hon.                      ], on the day of                      , 18                      , at                      o'clock in the forenoon for an order appointing some suitable and competent person (*d*)

on the application of the adverse party, must be upon notice. *Code*, § 116. In actions of partition ten days' notice must be given. *2 Rev. Stat.*, 576. As to notice in such cases, see *note (c)*, *Form 94, infra*. The notice may be served with the summons in form as above, and on the infant's failure to procure the appointment of a guardian *ad litem*, an absolute order may be obtained for his appointment. *Concklin v. Hall*, *2 Barb. Ch.*, 136. Another course is to wait until the expiration of twenty days from the service of the summons, and then obtain, on affidavit or petition (as on page 71, *infra*), an *ex-parte* order *nisi* for the appointment of a guardian (*Form 90*), which will be made absolute (*Form 92*) on proof that no application has been made by or on behalf of the infant. *Knickerbacker v. De Freest*, *2 Paige*, 304; *Concklin v. Hall*, *2 Barb. Ch.*, 136. Or an absolute order may be obtained in the first instance upon notice, as in *Form 94*. The latter is the preferable, and the usual course under the *Code*.

(c) If the infant has a general or testamentary guardian, the notice should be served upon him, and the clause in the brackets may be used. If he has none, and is over fourteen, the notice should be served on him; if under that age, upon the person with whom he resides. *Code*, § 116. Where he is a non-resident, instructions should be obtained from the court as to the manner of service. *Knickerbacker v. De Freest*,

*2 Paige*, 304. As to the case where neither the infant nor his guardian resides within the State, see *Ontario Bank v. Strong*, *2 Paige*, 301, where it is said that in the case of infants who are absentees, it is a matter of course to make an absolute appointment of a guardian *ad litem*, if they, or their friends, do not cause an appointment within twenty days after the expiration of the time limited in the order for their appearance. See *Concklin v. Hall*, *2 Barb. Ch.*, 136. By the amendment added to section 116 of the *Code* in 1862 (ch. 460), the case of infant absentees in partition and foreclosure is provided for (see *Form 97*); and by the amendment added in 1863 (ch. 292), the case of infants residing in States with which there is no regular communication by mail, is provided for.

(d) The court will not appoint a guardian *ad litem* for an infant defendant on the nomination of the plaintiff. *Knickerbacker v. De Freest*, *2 Paige*, 304; and see *Grant v. Schoonhoven*, *9 Id.*, 255. The rule, however, seems to be somewhat relaxed, especially where the plaintiff applies for the appointment of the general or testamentary guardian of the infant. Such person should always be selected for guardian *ad litem* of an infant, as will be most likely to protect his interests; and the nearest relative of the infant, having no adverse interests in the suits, is entitled to be heard in the selection. *Grant v. Van Schoonhoven, supra*.

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 Motion for Appointment of Guardian.
 

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guardian *ad litem* for you [*or*, for said defendant Y. Z.], and authorizing and directing him to appear and defend the above-entitled action in your behalf [*or*, in behalf of said defendant Y. Z.], and for such other and further relief as may be just.

[*Date.*]

[*Signature.*]

### 85. *Proof of Service of the Foregoing.*

[*Title of the cause.*]

[*Venue.*]

Q. R., being duly sworn, says that he is managing clerk in the office of the attorney of the plaintiff in this action; that on the            day of           , at           , he served a notice, of which the annexed is a copy, upon G. H., the general [*or*, testamentary] guardian within this State, of the infant therein named [*or*, that the infant therein named was over fourteen years of age, on the            day of           , 18   , and then had no general or testamentary guardian within this State], and that on the            day of           , at           , this deponent served a notice, of which the annexed is a copy, on said infant, by delivering the same to him personally (*e*) [*or*, that said infant is under fourteen years of age, and residing within this State, with W. Z., his mother, at           , and that on the            day of           , deponent served a notice, a copy of which is hereto annexed, on said W. Z., by delivering the same to her personally].

Deponent further says that twenty days have elapsed since service of such notice, but said infant has not appeared, and no application has been made by him or on his behalf for the appointment of a guardian *ad litem*, to the best of this deponent's knowledge and belief.

[*Signature.*]

[*Jurat.*]

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(*e*) According to the general rule prescribed by § 409, subdiv. 2, of the Code, this notice, if addressed to the infant, and to be served on him, may be served on him by leaving it at his residence, between six o'clock A. M. and nine o'clock P. M., with some person of suitable age and discretion.

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 Plaintiff's Petition against Defendant.
 

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 86. *Order of Appointment on Defendant's Failure to procure the Appointment after Notice.*

[*Title of the cause, &c.*]

On reading and filing the annexed notice, proof of service, and of no application on the part of the defendant for the appointment for guardian *ad litem*, and on motion of Q. R., counsel for the plaintiff,

\* ORDERED, that (f) be and hereby is appointed guardian *ad litem* of the infant defendant Y. Z. in this action, and is authorized and directed to appear and defend the same on his behalf as such guardian.

 IV. ANOTHER FORM FOR PLAINTIFF TO PROCURE APPOINTMENT,  
BY PETITION AND NOTICE OF MOTION THEREON.

 87. *Petition of Plaintiff.*

[*Title of the cause.*]

The petition of A. B. [attorney for], the plaintiff in this action, shows:

That it was commenced for [*here state briefly the object*], that the summons has been served on the defendant Y. Z., as appears by the summons and proof of service, hereto annexed [*or, on file in this court*].

That the defendant Y. Z., is an infant of                      years of age on the                      day of                      last, and that [although twenty days have elapsed since the service of the summons upon him] (g) he has neglected to apply for the appointment of a guardian *ad litem* in this action.

That said infant resides with his mother, W. Z., a widow, living in                      , and has not, to the best of the knowledge and information of this deponent, any general or testamentary guardian in this State [*or, otherwise state what guardianship the infant has*].

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(f) The guardian being nominated, his consent must be obtained, as in the preceding forms, except perhaps where he is an attorney or officer of the court.  
Rule 60

(g) If he is under the age of fourteen this reference to the lapse of time need not be inserted.

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Plaintiff's Motion for Defendant's Guardian.

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Wherefore, the plaintiff asks that some suitable and competent person be appointed guardian *ad litem* for said defendant, and be authorized and directed to appear and defend the action in his behalf, and for such other and further relief as may be just.

[Signature.]

[Verification.]

88. *Notice of the Motion thereon.*

[Title of the cause.]

To (h) .

Take notice, that on a petition, of which the foregoing [or, the within] is a copy, and on the summons and notice of object of action [or, complaint] in this action, copies of which were heretofore served on you, a motion will be made at the next special term [or, before Hon. , one of the justices] of this court, at , in the city of , on the day of , at the opening of court on that day, or as soon thereafter as counsel can be heard, for an order appointing a guardian *ad litem* for the within-named infant in this action, and for such other or further relief as may be just.

[Date.]

[Signature.]

[Proof of service, as in Form 85, *supra*.]

89. *Order appointing Defendant's Guardian on the Plaintiff's Petition.*

[Title of cause.]

On reading and filing the petition of A. B., dated , for the appointment of a guardian *ad litem* herein for the defendant Y. Z., and proof of due service thereof, and on motion of Q. R., plaintiff's counsel [continue as in Form 86, from the \*].

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(h) As to whom the notice should be addressed, see note (c), p. 65.

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Plaintiff's Motion against Defendant.

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## V. ANOTHER FORM, BY PETITION EX PARTE, AND ORDER NISI.

[*Petition, as in Form 87.*]90. *Order nisi.*[*Title of the cause.*][*At special term, &c.*]

On reading and filing the petition of A. B., dated ,  
for the appointment of a guardian *ad litem* for the defendant  
Y. Z., and on motion of Q. R., plaintiff's counsel,

ORDERED, that be appointed guardian *ad litem* of  
the defendant Y. Z., unless within ten days after service of a  
copy of this order upon him he procures a guardian *ad litem* to  
be appointed.

91. *Affidavit of Service and Default.*[*Venue.*]

A. B., being duly sworn, says that he is managing clerk in  
the office of the plaintiff's attorney. That on the  
day of , 18 , a certified copy of the annexed order was  
duly served (i) on A. B., the infant therein named [as appears by  
the annexed affidavit of T.], and that although more than ten  
days have elapsed since the service of said order upon him no  
application has been made on his behalf for the appointment of  
a guardian *ad litem*, to the best of deponent's knowledge and  
belief.

[*Signature.*][*Jurat.*]92. *Order Absolute. (j)*[*Title and Recitals, as in Form 86.*]

ORDERED, that the order of the day of ,  
18 , be made absolute, and the said E. F. be, and hereby is,  
appointed guardian *ad litem* for the defendant A. B., and is  
authorized to appear and defend this suit for him as such.

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(i) As to mode of service, compare Form 85, *supra*, and note. should be obtained (McVickar v. Constable, *Hopk.*, 102), and, together with an

(j) The guardian's written consent affidavit as in preceding forms, showing

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 Motion for Guardian.
 

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## VI. APPLICATION ON NOTICE, IN PARTITION.

93. *Petition on Notice (under the Code).* (k)[*Title of the cause.*]

To the Supreme Court [or, to the County Court of county].

The petition of A. B., plaintiff above named, shows :

That the above-entitled action is now pending in this court; that it is brought for the partition of certain real estate in the complaint herein particularly described, that the defendant Y. Z. above named is an infant of the age of            years, and is a necessary [or, proper] party defendant in this action, as your petitioner is advised and believes. Your petitioner further says, that said defendant Y. Z. has been duly served with the summons in this action, (l) as appears by the affidavit of service hereto annexed; that [although more than twenty days have elapsed since the service of said summons upon him] (m) no application on his behalf has been made for the appointment of a guardian *ad litem*, to the best of your petitioner's knowledge and belief.

Wherefore, &c., [as in Form 87].

[*Verification, Consent, and Affidavit, as in preceding forms.*] (n)

the guardian's qualifications, in compliance with Rule 60, should be presented to the court, together with his bond in cases where a bond is required, before making the order absolute.

(k) An application for appointment of a guardian *ad litem* for infant defendants in a partition suit may be made in conformity with the provisions of the Revised Statutes (2 *Rev. Stat.*, 317; *Althause v. Radde*, 3 *Bosw.*, 410); or it may be made under the provisions of the Code of Procedure (§ 115). *Rogers v. McLean*, 11 *Abbotts' Pr.*, 440; *Varian v. Stevens*, 2 *Duer*, 635.

(l) Where the application is made by the plaintiff in an action, and according to the former practice, or the provisions of the Code, the papers must distinctly

show the service of process on the defendant. *Grant v. Van Schoonhoven*, 9 *Paige*, 255; *People v. Hoffman*, 7 *Wend.*, 489.

Otherwise where the application is made by the infant in pursuance of 2 *Rev. Stat.*, 317. *Varian v. Stevens*, 2 *Duer*, 635.

(m) The allegation in brackets is only necessary where the infant is over fourteen years of age. When he is under that age the plaintiff may apply at any time. *Code*, § 116.

(n) Where no person is nominated by the plaintiff as guardian (see note (d), Form 84), the consent and affidavit must be procured after the court have named a guardian, and before entering the order.



[Notice of motion of eight (o) days, and in usual form, or Order to show cause.]

[*Title and Recitals, as in preceding forms.*]

95. *Bond of Guardian.*

KNOW ALL MEN BY THESE PRESENTS, that we, G. H., (p)  
K. L., and M. N., of \_\_\_\_\_, are held and firmly bound unto  
the People of the State of New York, in the penal sum of [*as  
fixed by the order*], for which payment well and truly to be  
made, we bind ourselves, our heirs, executors, and adminis-  
trators, jointly and severally, firmly by these presents. Sealed  
with our seal, and dated this \_\_\_\_\_ day of \_\_\_\_\_,  
18 \_\_\_\_\_.

guardian, or, if there is no such guardian, on the infant. *Laws of 1833*, 311, ch. 227.

(p) The guardian *ad litem*, in a bond under the statute, must himself sign the bond. A bond by sureties in his behalf in which he does not join, will not satisfy the statute. *Jennings v. Jennings*, 2 *Abbotts' Pr.*, 6.

## Motion for Guardian.

WHEREAS, by an order of the Court, made at a special term held at , on the day of , said G. H. was appointed guardian of Y. Z., an infant, for the purposes of an action of partition which has been commenced against said infant [and others], upon said guardian's giving due security.

NOW, THEREFORE, THE CONDITION of this obligation is such, that if the said G. H. shall faithfully discharge the trust committed to him as such guardian, and render just and true account of his guardianship, in all courts and places, when thereunto required, then this obligation to be void, otherwise to remain in full force.

[Signatures and seals.]

[Witness.]

[Acknowledgment or Proof, and Judge's Approval.]

96. *Notice of Application before commencing Partition (under the Revised Statutes).* (q)

To the General Guardian of A. B., an Infant.

Take notice, that the undersigned will apply to the Court of , at a special term, to be held at , on (r) , to appoint a suitable and disinterested person to be guardian of said minor for the special purpose of taking charge of the interests of such minor, in relation to proceedings which the undersigned intends to commence, by action, in said court, for the partition of [*briefly designate estate*], in which you [*or, Y. Z., your ward*], has, or claims some interest.

[Date.]

[Signature.]

VII. IN CASE OF NON-RESIDENT INFANT DEFENDANTS. (s)

97. *Petition.*

[*Title of the cause.*]

A. B. of , plaintiff [*or, attorney for the plaintiff*] in this action, being duly sworn, says, that this action is now

(q) This application may be made or their guardians. 2 *Rev. Stat.*, 317, pursuant to 2 *Rev. Stat.*, 317, before § 2. commencing the action. *Althause v. Radde*, 3 *Bosw.*, 410. (s) This application, which is under section 116 of the Code, as amended

(r) Ten days' notice is necessary, but by *Laws of 1862*, 847, ch. 460, must be made to the court at special term.

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 In Partition.
 

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pending in this court, being brought for the partition of real estate, situated in the county of \_\_\_\_\_, that the defendant Y. Z. is a necessary or proper party thereto, but is an infant under the age of twenty-one years, and resides without the State, to wit, at \_\_\_\_\_, [as the deponent is informed and verily believes, by W. Z., the brother of said infant, who resides at \_\_\_\_\_,] and that there is no regular communication by mail with such place (t) [or, resides without this State, but the place of his residence is not known to the defendant, and his residence cannot on due inquiry be ascertained by the petitioner, although he has diligently made such inquiry, *stating how*].

That this action was commenced by service of the summons upon \_\_\_\_\_ [or, by order for the service of summons upon said infant by publication, made by this court on the day of \_\_\_\_\_, and the first publication of the same was made on the \_\_\_\_\_ day of \_\_\_\_\_].

That no appearance by or on behalf of said infant, and no application for an appointment of a guardian *ad litem* by him, or on his behalf, has been made, to the best of this deponent's knowledge and belief.

Wherefore, &c. [*as in preceding forms*].

[*Verification.*]

 98. *Order thereon.*

[*Title of the cause.*] \_\_\_\_\_ [*At a special term, &c.*]

On reading and filing the affidavit of A. B., the plaintiff in the above-entitled cause, setting forth, among other things, that Y. Z., one of the above-named defendants, is a non-resident infant, and that no guardian has been appointed for him in this action; on motion of B. H., plaintiff's attorney, it is ordered that J. L. F. of \_\_\_\_\_, counsellor-at-law, be appointed guardian *ad litem* of said infant defendant for the purposes of this action, unless the said defendant, or some one in his behalf, within twenty days after service of a copy of this order in the

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(t) See *Laws of 1863*, 657, ch. 392.

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Appointment of Guardian.

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manner herein directed, procure a guardian *ad litem* to be appointed, and give notice thereof to the plaintiff's attorney.

It is further ordered, that this order be served on said infant, either by personal service on W. Z., the mother of said infant, with whom he resides, or by depositing a copy thereof in the post-office at \_\_\_\_\_, properly inclosed in an envelope, with postage prepaid, and directed to said W. Z., at her place of residence; to wit, the town of \_\_\_\_\_, &c. [*or, specifying such other mode of service as the court shall direct*]; and that said guardian execute to the People of this State, and duly acknowledge and file a bond, &c. [*as in Form 71, p. 57, or, if the clerk be appointed, the clause may be omitted*].

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 Analysis of Section of Summons and Notices.
 

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## CHAPTER VI.

## COMMENCEMENT OF ACTION.

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 SECTION I.

## SUMMONS, (a) AND NOTICES OF ACTION.

## I. SUMMONS

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(a) It has been said that the summons is to be governed by the rules formerly applicable to a *capias*, so far as they can properly be made to apply. *Blanchard v. Strait*, 8 *How. Pr.*, 83 ; and see *Tuttle v. Smith*, 6 *Abbotts' Pr.*, 329 ; and *People v. Bennett*, *Id.*, 343.

## Commencement of Actions.

## I. SUMMONS.

99. *Summons in an Action arising on Contract for the Recovery of Money only (b)—Complaint Served.*

[Name of the Court.] (c)

A. B. [plaintiff]

against

Y. Z. [defendant].

To Y. Z., defendant (d) [or, one of the defendants] above named.

You are hereby summoned and required to answer the com-

(b) This form, notifying the defendant that, if he fail to answer, the plaintiff will take judgment against him for a specified sum, is required in "an action arising upon contract for the recovery of money only." *Code*, § 129, subd. 1. It is settled in the Supreme Court that this is appropriate only in actions for the recovery of a definite sum as such, and where the court will not be called on to ascertain or adjudge any thing but the existence and terms of the contract by which it is due. *Tuttle v. Smith*, 6 *Abbotts' Pr.*, 329; *People v. Bennett*, *Id.*, 343. In the latter case, and also in *Commissioners of Excise v. Claason*, 17 *How. Pr.*, 193, it was held that this form is appropriate in an action to recover a statute penalty, and it seems that it would be so in an action upon a judgment; so also in an action for goods sold. *Diblee v. Mason*, 1 *Code R.*, 37. But see note (gg) on p. 78.

Upon the other hand, any action that requires the determination of amounts unliquidated, in their nature requiring other proof, and depending upon other considerations than such as appear in the contract itself, is not to be deemed an action for the recovery of money only, but rather an action to ascertain and establish the plaintiff's right to damages, which are to be paid in money. The notice prescribed by sub-

division 2, is the proper one in such cases,—e. g., in an action for conversion, *Voorhies v. Schofield*, 7 *How. Pr.*, 51;—even though the complaint sounds chiefly in contract, as for goods sold, *Ridder v. Whitlock*, 12 *Id.*, 208;—in an action for damages for breach of promise of marriage, *Davis v. Bates*, 6 *Abbotts' Pr.*, 15; and see *McNeff v. Short*, 14 *How. Pr.*, 463;—or for breach of warranty, *Dunn v. Bloomingdale*, 6 *Abbotts' Pr.*, 430, note;—or for deceit, *Levy v. Nicholas*, 15 *Id.*, 63, note;—or on an undertaking of bail, *Kelsey v. Covert*, 6 *Id.*, 336, note; *Levy v. Nicholas*, 15 *Id.*, 63, note;—or for breach of agreement to carry on business, *Tuttle v. Smith*, *supra*;—or to till a farm, *Cobb v. Dunkin*, 19 *How. Pr.*, 164;—or to buy, *Salters v. Ralph*, 15 *Abbotts' Pr.*, 273;—or to sell on commission, *Norton v. Crary*, 14 *Id.*, 364;—or to convey lands, *Johnson v. Paul*, 6 *Id.*, 335, note. Where, however, in such case, the damages were liquidated by the agreement, the notice prescribed by subdivision 1 is proper. *Cemetery Board v. Teller*, 8 *How. Pr.*, 504. So, also, the notice prescribed by subdivision 2 is proper in an action against a common carrier, although in form an action on his contract, *Hewett v. Howell*, *Id.*, 346; *Clor v. Mallory*, 1 *Code R.*, 126; *Flynn v. Hudson River R. R. Co.*, 6 *How. Pr.*

## Summons.

plaint annexed, and serve a copy of your answer on the subscriber at his office [*specifying it, or other place of service*] within twenty days after the service of this summons on you,

94; *Luling v. Stanton*, 2 *Hilt.*, 538;—also, in an action on a contract for the payment of money only, where the plaintiff seeks, by allegations of fraud, to avoid an unexpired credit, and to have an immediate judgment for the sum agreed to be paid, *Travis v. Tobias*, 7 *How. Pr.*, 90;—also, in an action against an attorney, for an accounting and payment of balance, *West v. Brewster*, 1 *Duer*, 647;—also, in a creditor's action, *Shaffer v. Humphreys*, 15 *How. Pr.*, 564; and see *Baxter v. Arnold*, 9 *Id.*, 445.

In the New York Superior Court a more literal construction was asserted in *Croden v. Drew*, 3 *Duer*, 652. That action was for breach of a contract to convey real property, and the demand for judgment was "for damages by reason of the non-fulfilment of the contract to the amount of \$1,000,—and also for the sum of \$300,—paid to the defendant on account of the purchase-money," with interest, &c.; and it was held that the summons in such case must be in the form prescribed by subdivision 1. The Supreme Court cases have, however, since been followed in the Superior Court. *Levy v. Nicholas*, 15 *Abbotts' Pr.*, 63, *note*.

It is important that the summons be correct in this respect, since, if it contain the wrong notice, the defendant may have the complaint set aside on motion, for irregularity in presenting a cause of action which does not conform to the summons, *Croden v. Drew*, *supra*;—and this has been done even where the complaint was served with the summons. *Tuttle v. Smith*, 6 *Abbotts' Pr.*, 329; and see *Id.*, 340, *note*.

Both notices should not be united. *Baxter v. Arnold*, 8 *How. Pr.*, 445. If causes of action of both classes are

united in the complaint, the summons should be for relief only. *Norton v. Cary*, 14 *Abbotts' Pr.*, 364; S. C., 23 *How. Pr.*, 469.

(c) The summons ought to specify the name of the court, *Anon.*, 2 *Code R.*, 75; *Dix v. Palmer*, 5 *How. Pr.*, 233;—though the defect is not fatal, *Tallman v. Hinman*, 10 *Id.*, 89;—especially if the complaint is served and does specify it. *Blanchard v. Strait*, 8 *Id.*, 83. The settled practice requires the summons to contain the title of the cause, although the omission of it seems not to be an irregularity, where the complaint contains it, and is served at the same time with the summons. See *Anonymous*, 2 *Code R.*, 75; *Tallman v. Hinman*, 10 *How. Pr.*, 90; *Walker v. Hubbard*, 4 *Id.*, 154; *Dix v. Palmer*, 5 *Id.*, 233; and 3 *Code R.*, 214; *James v. Kirkpatrick*, 5 *How. Pr.*, 241; and 3 *Code R.*, 174. The names of the parties should be fully stated, as in the title of the complaint. Where the summons styled the plaintiff, A. B., administrator, &c., of A. B., and the complaint was by A. B. in his individual right, the variance was held fatal, and the complaint set aside. *Blanchard v. Strait*, 8 *How. Pr.*, 83. As to the manner in which official persons, &c., should be designated, see the chapter of COMPLAINTS.

(d) It is ordinarily sufficient to address the summons "To the defendant," without repeating his name here. But it is often the case, in an action against several defendants, that the plaintiff desires to serve a copy of the complaint upon some of them at the same time with the summons, but upon others to serve the summons alone. Thus, in a foreclosure action he will desire to serve a complaint, with the summons

## Summons for Money-demand.

exclusive of the day of service. (e) If you fail to answer the complaint within that time, \* the plaintiff will take judgment against you for the sum of                      dollars [with interest from the (f) day of                      , one thousand eight hundred and                      ; *or, if the demand is for the amount of several sums bearing interest from different dates*, with interest on                      dollars thereof from the                      day of                      , &c., and on                      dollars thereof from the                      day of                      , &c.], and costs.

A. B., plaintiff. (g)  
[Or, M. N., plaintiff's attorney].  
[Place of residence.]

upon the mortgagor, but to serve a notice of the object of the action and of no personal claim, with the summons, upon subsequent incumbrancers. In such cases it is common to employ both forms of summons: *Form 100*, referring to the complaint as annexed, for those defendants on whom the complaint is served; and *Form 101*, stating where the complaint will be filed, for those on whom it is not served; when this is done, each summons should be directed to those defendants alone for whom it is intended. A more convenient way is to use the latter form for all such cases, and to indorse upon the copy-complaint served such a notice as this:

"To Y. Z., one of the defendants. Please take notice that the within is a copy of the complaint referred to in the foregoing summons. Yours, &c.,

"A. B., plaintiff.

["Or, M. N., plaintiff's attorney.]

["Place of residence."]

A summons is irregular, which, at the time of service, is unaccompanied by a complaint, and does not state where the complaint is or will be filed. *Pignolet v. Daveau*, 2 *Hilt.*, 584.

(e) As to service of answer in compliance with this requirement of the summons, see *Lord v. Vandenburg*, 15 *How. Pr.*, 363.

(f) It is not necessary to specify the amount of interest claimed. It is sufficient if the data for its computation are distinctly given as in the form above. *Swift v. Dewitt*, 3 *How. Pr.*, 280, 283; S. C., 1 *Code R.*, 25.

(g) See *Weare v. Slocum*, 3 *How. Pr.*, 397; S. C., 1 *Code R.*, 105; *Hill v. Thaxter*, 4 *How. Pr.*, 407; S. C., 2 *Code R.*, 3; Rule 10. The amendment of 1870 requires subscription by attorney.

A printed subscription is sufficient, *Mutual Life Ins. Co. v. Ross*, 10 *Abbotts' Pr.*, 260, *note*;—though the contrary was intimated in *Farmers' Loan & Trust Co. v. Dickson*, 9 *Id.*, 61.

(gg) In the recent case of *Mason v. Hand*, 1 *Lans.*, 66, the rule as to form of summons was stated to be, that where an action is directly upon a contract, express or implied, to recover the moneys due thereby; for example, a claim for board and necessities, whether on an alleged promise to pay therefor, or for a *quantum meruit*, the summons should be for a specific sum, in accordance with the provision of Subdivision 1, § 129, of the Code; and that it is only where the contract is only necessary as an inducement, and the *gravamen* of the action is a breach thereof, and the damages, that the summons in an action on contract need be for relief.



## Summons.

100. *Summons for Relief (h)—Complaint Served.*

[*As in preceding form to the \*, and then continue*] the plaintiff will apply to the court for the relief demanded in the complaint. (i)

A. B., plaintiff.

[*Or, M. N., plaintiff's attorney.*]

[*Place of residence.*]

101. *Summons for Money-demand, or for Relief—Complaint not Served.*

[*Title of the cause.*]

To Y. Z., defendant [*or, one of the defendants*] above named.

You are hereby summoned and required to answer the complaint in this action which is [*or, which will be*] filed (j) in the office of the clerk of the city and county of New York, at the City Hall in said city [*or, in the office of the clerk of the county of Albany, at the City Hall in the city of Albany; or, in the office of the clerk of the City Court of Brooklyn, in the City Hall of said city; or, other place as the case may be*], in the State of New York, (k) and serve a copy of your answer on the subscriber at his office [*specifying it, or other place of service*] within twenty days after the service of the summons on you, exclusive of the day of service. If you fail to answer the complaint within that time, the plaintiff will take judgment against you for the sum of                      dollars [*with interest from, &c.*] and costs [*or, the plaintiff will apply to the court for the relief demanded in the complaint*].

A. B., plaintiff.

[*Or, M. N., plaintiff's attorney.*]

[*Place of residence.*]

(h) As to the actions in which this form should be used, see note (b), *supra*.

(i) It is not the practice to specify the place at which the application will be made, although an early case held this necessary. *Warner v. Kenny*, 3 *How. Pr.*, 323; *S. C.*, 1 *Code R.*, 96.

(j) The summons ought properly to state that the complaint, not that a

copy of it, is or will be filed. *Hart v. Kremer*, 2 *Code R.*, 50.

(k) The words "in the State of New York," though proper, are not essential where the defendant cannot be supposed to be misled by their omission. *Cook v. Kelsey*, 19 *N. Y.*, 412. See also, *Davidson v. Powell*, 13 *How. Pr.* 287.

### Summons in Marine and District Courts.

102. *Summons in the Marine Court of the City of New York.*

[*Title of the cause.*]

THE PEOPLE OF THE STATE OF NEW YORK:

To the defendant Y. Z.

You are hereby summoned and required to be and appear before the Marine Court of the city of New York, at the City Hall in the city of New York, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_ o'clock, A. M., to answer the complaint in this action, of which a copy is herewith served upon you, and to file a copy of your answer to the said complaint in the office of the Clerk of the Marine Court, of the city of New York; and if you fail to answer the complaint at the time aforesaid, the plaintiff in this action will take judgment against you for the sum of \_\_\_\_\_ dollars, with interest from the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_; besides the costs of this action.

Witness, our Justices of our said Marine Court, at the City Hall of our said city, the \_\_\_\_\_ day of \_\_\_\_\_, in the year one thousand eight hundred and \_\_\_\_\_.  
\_\_\_\_\_, Clerk.

103. *Summons in District Courts of the City of New York.*

[Title of the cause.]

[Stamp.]

To Y. Z., defendant.

You are hereby summoned and required to appear in this action, before \_\_\_\_\_, Justice of the District Court in the city of New York, for the \_\_\_\_\_ Judicial District, in the court, at the court-room thereof, at \_\_\_\_\_, in the city of New York, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_ o'clock, in the forenoon, to answer the complaint of the plaintiff in this action, who will take judgment against you for the sum of \_\_\_\_\_ dollars, with interest from the \_\_\_\_\_ day of \_\_\_\_\_, one thousand eight hundred and \_\_\_\_\_, if you fail to appear and answer. \_\_\_\_\_, Clerk.

Dated New York, 11, 18 91.

104. *Indorsement on Summons in an Action for Penalty.* (l)

Issued according to the provisions of the statute concerning the incorporation of turnpike and plank road companies, and the collection of penalties for demanding and recovering more than lawful toll, in passing through toll-gates on such roads [*or, other explicit reference to the statute*]. (m)

105. *Notice to be Appended to Summons when Published.* (n)

Take notice that the complaint in this action [together with the summons, of which the foregoing is a copy], was filed in the office of the clerk of the \_\_\_\_\_ court, at \_\_\_\_\_, in the county of \_\_\_\_\_, in the State of New York, on the \_\_\_\_\_ day of \_\_\_\_\_ (o) [Date.] [Signature and address of attorney.]

106. *Notice to be Appended to the Summons in case of a Non-resident Defendant, proceeded against under the Act of 1842.*

To Y. Z., one of the defendants in this cause, whose place of residence is unknown.

TAKE NOTICE, that this action is commenced for the foreclosure of a mortgage [*or*, for partition of land] in the Supreme Court of the State of New York, in and for the county of \_\_\_\_\_, and that the complaint [together with the summons, of which above is a

(7) This is required on every process issued for the purpose of compelling the appearance of the defendant to any action for the recovery of any penalty or forfeiture. 2 *Rev. Stat.*, 481, §7.

(*m*) The reference should be specific, to the particular statute, or the particular division of the Revised Statutes, under which the action is brought, naming the section if may be. *Avery v. Slack*, 17 *Wend.*, 85. Compare, as to what is sufficiently explicit, *Marsels v. Seaman*, 21 *Burb.*, 319; *Andrews v. Harrington*, 19 *Id.*, 343; *Perry v. Tynen*,

22 *Id.*, 137. The form given above is supported by *Marselis v. Seaman*, 21 *Barb.*, 319.

(n) It is usual and sufficient to append this notice instead of embodying it in the summons. *Cook v. Kelsey*, 19 *N. Y.*, 412.

(o) Omitting the name of the State, or an error in the day named, if such that it could not mislead the defendant, may not be a fatal error. *Id.*; *Jacquerson v. Van Erben*, 2 *Abbotts' Pr.*, 315. See, also, *Van Wyck v. Hardy*, 11 *Abbotts' Pr.*, 473; *S. C.*, 20 *How. Pr.*, 222.

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 Object of Action, and no Personal Claim.
 

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copy,] was filed in the office of the clerk of said county at \_\_\_\_\_, in the county of \_\_\_\_\_, in said State, on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_; and that you are required to appear in the cause by the \_\_\_\_\_ day of \_\_\_\_\_ next, or the plaintiff will apply to the court for the relief demanded in the complaint.

[Date.]

[Signature and address of attorney.]

## II. NOTICES OF OBJECT OF ACTION.

107. *Notice in Partition.*

[Title of the cause.]

To X. Y., one of the defendants above named.

Sir: Take notice that the object of this action, in which a summons is herewith served upon you, is \* to obtain partition of the premises described below, to be made among the owners thereof by commissioners to be appointed for the purpose, or to obtain a sale thereof to be made, and a division of the proceeds, if a partition cannot be made without prejudice to the interests of the owners.

The premises in question are described in the complaint as follows [copy description].

No personal claim is made against you.

[Date.]

[Signature.]

108. *The Same in Foreclosure.*

[As in the preceding form to the \*, continuing thus:] to foreclose [and satisfy] a mortgage executed by W. X., and Y. X., his wife, to Y. Z., on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_, for the sum of \_\_\_\_\_ dollars, with interest from \_\_\_\_\_, 18 \_\_, which mortgage was recorded in the office of \_\_\_\_\_, on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_, in Book No. \_\_\_\_\_ of Mortgages, page \_\_\_\_\_, upon the following described premises [here designate the premises, which may be done by copying the description from the complaint].

No personal claim is made against you.

[Date.]

[Signature.]

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 Notices of Lis pendens.
 

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## III. LIS PENDENS.

109. *Notice of Pendency of Action for Foreclosure.* (p)[*Title of cause.*] (q)

NOTICE IS HEREBY GIVEN, that an action has been commenced in this court upon a complaint of the above-named plaintiff against the above-named defendants for the foreclosure of a mortgage, bearing date the                      day of                      \*, executed by                      , of                      , to                      , of                      , to secure [*here state the condition of the mortgage*] which mortgage was recorded (r) in the office of the clerk [*or, register*] of the [city and] county of                      , on the                      day of                      , at                      o'clock in the                      noon; and that the mortgaged premises in the last-mentioned county, affected by the said foreclosure, were at the time of the commencement of this action, and at the time of filing this notice, situated in the                      ward of the city of                      , in the last-mentioned county, and are described in the said mortgage as follows, to wit [*description of lands*].                      [*Signature.*]

[*Date.*]110. *Notice of Pendency of Action for Partition.*[*Title of cause.*]

NOTICE IS HEREBY GIVEN, that an action has been commenced in this court, upon a complaint of the above-named plaintiff, against the above-named defendants, \* for the purpose of obtaining a partition and division of the premises therein described among the owners thereof, or for a sale thereof, under the direction of this court, and for a division of the proceeds of such sale among such owners, according to their respective rights; which

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(p) This notice must be filed twenty days before judgment.

(q) Accuracy in the names of the parties in the title of a notice of pendency of action is very important.

(r) The notice must contain the date

of the mortgage, the parties thereto, and the time and place of recording the same; but omitting to state in what county the mortgage is recorded, does not render the judgment void. *Potter v. Rowland*, 8 N. Y. (4 Seld.), 448.

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 Notices of Lis pendens.
 

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premises were, at the time of the commencement of this action, and the time of filing this notice, situated in the ward of the city of , and are described in the said complaint as follows [*description of premises*].

[Date.]

[Signature.]

111. *Notice of Pendency of Action in which an Attachment affecting Real Property has been issued.*

[*As in preceding form to the \**] upon a promissory note made by the defendant, in which action the plaintiff demands judgment thereupon for the sum of dollars [*or, otherwise state object of action, and the relief demanded*]; and that a warrant of attachment, under ch. 4, title 7, part 2, of the Code of Procedure, was on the day of , 18 , at , duly issued in this action against the defendant Y. Z., by this court, and directed to the Sheriff of the county of , and delivered to him for execution, whereby the following real property is intended to be affected [*here describe the property*].

[Signature.]

[Date.]

112. *Affidavit of filing Notice of Action pending.*

[Title of cause.]

[Venue.]

Q. R., plaintiff's attorney, being duly sworn says, that a notice of the pendency of this action, of which the annexed is a copy, was on the day of , 18 , filed in the office of the clerk in the county of , in which county said premises are situated, and since the filing of said notice, the summons and complaint in this action have not been amended by making new parties to the action, or, so as to affect property not described in said notice.

[Signature.]

[Jurat.]

SECTION II.

SERVICE OF SUMMONS.

I. SERVICE BY PUBLICATION. (a)

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I. SERVICE BY PUBLICATION.

113. *Affidavit, (b) where Defendant is a Foreign Corporation.*

[*Title of cause.*]

[*Venue.*]

A. B., plaintiff above named, being duly sworn says :

I. That a cause of action exists in his favor against the defendants above named, the grounds of which are as follows :—

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(a) The practitioner cannot be too careful in the preparation of the papers for service by publication, as it is held that the jurisdiction of the court depends on a strict compliance with all the directions of the statute. *Kendall v. Washburn*, 14 *How. Pr.*, 380; *Hallett v. Righters*, 13 *Id.*, 43; *Brisbane v. Peabody*, 3 *Id.*, 109; *Warren v. Tiffany*, 9 *Abbotts' Pr.*, 66; *S. C.*, 17 *How. Pr.*, 106; *Fiske v. Anderson*, 12 *Abbotts' Pr.*, 8; *S. C.*, 33 *Barb.*, 71; *Towsley v. McDonald*, 32 *Id.*, 604

(b) A verified complaint is an affi-

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Affidavit for Publication against Foreign Corporation.

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[*here briefly state grounds of action; or, where the application is made at special term, say, the grounds of which appear by the sworn complaint in this action, hereto annexed, the statements contained in which are true, to the knowledge of the deponent*].\* (c)

II. That the defendants are a foreign corporation, created under the laws of the State of \_\_\_\_\_, having their place of business in \_\_\_\_\_, in that State; and no officer [*or, agent*] (d) of said defendant, upon whom service of summons can by law be made, can after due diligence be found within this State, although the deponent has made inquiry [*stating what*].

III. That the president of said corporation [*or, other officer proposed to be served by mail*] is M. N., who resides at \_\_\_\_\_

IV. That the defendants have property within this State, at \_\_\_\_\_, consisting of [*describe property*].

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davit, and may be used as such. But when it is so used the complaint or its verification should specify what portion of the allegations are on information and belief, and the more material allegations should be sworn to positively, or the grounds of belief and sources of information stated. *Roome v. Webb*, 1 *Code R.*, 114; *Minor v. Terry*, 6 *How. Pr.*, 208; *Jones v. Atterbury*, 1 *Code R., N. S.*, 87; and see *Smith v. Reno*, 6 *How. Pr.*, 124; *Penfield v. White*, 8 *Id.*, 87. Or, an allegation may be inserted, as here, in the affidavit, that the facts stated in the complaint are true, and if any of them are stated on information and belief, the sources of information and grounds of belief may be given.

(c) The order may be made at special term, or at chambers, or by the county judge of the county. But as the affidavit and order must in all cases be filed (*Rule 4*), and as the complaint is required to be filed prior to publication (*Code*, § 135, last part of subd. 5), it is well, where practicable so to do, to apply at special term, on the complaint

with an affidavit, and to file the complaint at the time. This often saves a repetition of the grounds of action in the affidavit.

(d) It must be proved to the officer who is to make the order that the person to be served (not the defendant) cannot after due diligence be found in this State. *Hulburt v. Hope Mut. Ins. Co.*, 4 *How. Pr.*, 275; and the affidavit should mention the name of the State in which the defendants are incorporated. 1 *Barb. Ch. Pr.*, 96. Service of process upon a foreign corporation, doing business in this State, may be made upon any person found within the State acting as their agent unless by a designation filed in the office of the secretary of state they have appointed some person in the county in which they are doing business, to receive service. *Laws of 1855*, 470, ch. 279. Foreign insurance companies are required by law to file a designation of an agent or attorney on whom process may be served. *Laws of 1862*, 506, ch. 300, § 2; *Id.*, 617, ch. 367, § 5.



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 Order for Publication against Foreign Corporation.
 

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V. That the cause of action against said defendants arose in this State, as appears by the foregoing statements [*or*, the annexed complaint]. (*e*) [*Signature.*]

[*Jurat.*]

114. *Order of the Court for the Publication of the Summons, where the Defendant is a Foreign Corporation.*

[*Title, &c.*]

[*At a special term.*]

It appearing to the satisfaction of the court by the annexed affidavit [and complaint], that \* the defendants are a foreign corporation, and that a cause of action exists against them in favor of the above-named plaintiff; that the defendants have property within this State [*or*, that the cause of action arose within this State], and that no officer [*or*, agent] of the defendants can with due diligence be found within the State, on whom service of process can be made according to law; and that the president [*or other officer, &c.*] of said corporation is M. N., and resides at :† on motion of Q. R., plaintiff's counsel,

ORDERED, that the summons herein, a copy whereof is hereto annexed, (*f*) be served by publication of the same in two newspapers as follows: (*g*) in the , published in , and in the , published in ; once in each week for six weeks; and that a copy of the sum-

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(*e*) The court has no jurisdiction to proceed against a foreign corporation, unless the plaintiff is a resident of the State, or the cause of action has arisen, or the subject-matter of it is situated, within the State. *Code*, § 472. It is, however, said in *Bates v. New Orleans, Jackson & Great Northern R. R. Co.*, 4 *Abbotts' Pr.*, 72, that proof of these facts need not be given before issuing an ordinary summons, but it seems safer to insert the averment in case of proceeding by publication. If therefore this averment is not inserted, an averment that the plaintiff is a resi-

dent of the State should be substituted.

(*f*) The order for publication should recite the summons in the action, or refer to it as being annexed, that it may appear that there was a summons, and for the purpose of identifying it. *Rawdon v. Corbin*, 3 *How. Pr.*, 416; *Vernam v. Holbrook*, 5 *Id.*, 3; *Evertson v. Thomas*, *Id.*, 45.

(*g*) An order of publication as to a non-resident defendant in Chancery, should specify the name of the newspaper. *Dieffendorff v. Heath*, 6 *Ch. Sent.*, 32.

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Affidavit for Publication against Absent or Absconding Debtor.

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mons and complaint be forthwith deposited in the post-office, (*h*) directed to the president (*i*) of the defendants at his said place of residence, and the postage paid thereon.

115. *Affidavit where Defendant has departed from the State, to defraud Creditors, or to avoid Service.*

[As in Form 113, to the \*.]

II. That the defendant is a resident of this State, to wit, of \_\_\_\_\_, (*j*) but cannot after due diligence be found within the State. That a summons in this action has been made out, a copy whereof is hereto annexed, and due diligence has been used to effect its service (*k*) [*here state what effort has been made; or, annex and refer to return of officer or affidavit of other person attempting to make service*]. (*l*) That as this deponent believes the defendant has departed from this State, to \_\_\_\_\_, in the State of \_\_\_\_\_, with intent to defraud his creditors [*or, with intent to avoid the service of summons, or both*], and the grounds of his belief are as follows:—[*here set out in detail the*

(*h*) If an order for service by publication does not direct that a copy of the summons and complaint be mailed, it is fatally irregular. *Warren v. Tiffany*, 9 *Abbotts' Pr.*, 66; S. C., 17 *How. Pr.*, 106. It must direct them to be forthwith deposited. *Hyatt v. Wagenright*, 18 *Id.*, 248.

(*i*) The name of the president or other head of the corporation, or of the secretary, cashier, treasurer, a director, or managing agent, may be inserted here, as service on any of these officers is good. *Code*, § 134, subd. 1. And the order for publication is unnecessary and will not be granted if any of these officers can be found and served within the State.

(*j*) His particular place of residence must be alleged, so that the order may direct as to mailing the summons, &c.

(*k*) This allegation of effort to serve summons is necessary except where

the affidavit shows that the defendant resides out of the State. *Vernam v. Holbrook*, 5 *How. Pr.*, 3; *Rawdon v. Corbin*, 3 *Id.*, 416. But showing an unsuccessful effort at service is not enough unless it also appears that the defendant cannot be found, and that he has either departed from the State, or keeps himself concealed for the purpose of defrauding his creditors or avoiding the service of process. *Van Rensselaer v. Dunbar*, 4 *Id.*, 151.

(*l*) It rests solely with the judge who grants the order for publication to determine whether or not due diligence has been used to effect a personal service on the party to be served; and if the affidavit is in form sufficient, his granting the order is evidence that it appeared to his satisfaction that due diligence was used, and though the evidence of diligence may be slight the order will not be set aside. *Roche v. Ward*, 7 *How. Pr.*, 416.

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Affidavit for Publication against Fraudulent Debtors,

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*facts and circumstances which show that the defendant has done so*]. (m)

116. *The Same, where the Defendant keeps himself Concealed.*

[*As in Form 113, to the \*.*]

II. That the defendant is a resident of this State, to wit, of \_\_\_\_\_, but cannot after due diligence be found within the State. That a summons in this action has been made out, a copy whereof is hereto annexed, and due diligence has been used to effect its service [*here state what, or annex proof*]. That as this deponent believes the defendant keeps himself concealed (n) within this State, with intent to defraud his creditors [*or, with intent to avoid the service of summons, or both*]; and that the grounds of his belief are as follows:—[*setting them out in detail*]. (o)

117. *Order, where Defendant has Departed or Conceals Himself.*

[*As in Form 114, to the \**]; that a cause of action exists against the defendant Y. Z., in favor of the above-named plaintiff; but that the said defendant cannot after due diligence be found within this State, he having departed therefrom [*or, he keeping himself concealed within this State*], with intent to defraud his creditors [*or, with intent to avoid the service of summons, or both*], and that the defendant's residence is at \_\_\_\_\_

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(m) For this purpose it is held that the affidavit must show that the defendant had property of some kind; and that he had made, or was about to make, a fraudulent or illegal disposition of it; or that he unjustly refused to apply it to the payment of his debts; or had secreted or removed, or was about to secrete or remove it; or had fraudulently incumbered it. *Towsley v. McDonald*, 32 *Barb.*, 604.

Where he is charged with intent to avoid service of summons, it is also re-

quired that the affidavit should show that a summons was out against him when he left; or one was about to be issued against him; or that he was threatened with, or feared, or expected a suit. *Ib.*

(n) Openly avoiding service, by eluding the approach of the officer, is not keeping concealed, within section 135 of the Code. *Van Rensselaer v. Dunbar*, 4 *How. Pr.*, 151.

(o) See notes (d), (k), and (m), *supra*, as to what should be alleged.

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Orders for Publication of Summons.

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[*or, is unknown, and cannot with due diligence be ascertained*]; † on motion of Q. R., plaintiff's counsel,

ORDERED, that the summons herein, a copy whereof is hereto annexed, be served by publication of the same in two newspapers as follows: in the \_\_\_\_\_, published in \_\_\_\_\_, and in the \_\_\_\_\_, published in \_\_\_\_\_, once in each week for six weeks § [*and where the residence is known, add*], (p) and that a copy of the summons and complaint be forthwith deposited in the post-office, directed to said defendant at his said place of residence, (q) and the postage paid.

118. *Affidavit, where Defendant is a Non-resident.*

[*As in Form 113, to the \*.*]

II. That the defendant is not a resident of this State, (r) but resides in the city of \_\_\_\_\_, in the State of \_\_\_\_\_, as deponent is informed by O. P., the agent and business correspondent in this city (s) of said defendant; and that said defendant cannot after due diligence be found within this State, he now being at \_\_\_\_\_ [*or otherwise state grounds of belief*]. (t)

(p) It is held essential to the validity of an order for publication of a summons, under subdiv. 2 of section 135 of the Code,—which presupposes that the debtor is a resident of the State, but has departed therefrom or keeps himself concealed therein,—that it direct a copy to be deposited in the post-office, directed to the defendant at his place of residence, though it appear from the affidavit that he has departed therefrom. *Towsley v. McDonald*, 32 *Barb.*, 604.

(q) The place of residence should be named. *Hyatt v. Wagenright*, 18 *How. Pr.*, 248. As to the meaning of this phrase, "at his place of residence," see *Oothout v. Rhinelander*, 10 *Id.*, 460; *Rowell v. McCormick*, 5 *Id.*, 337. Compare *Lord v. Vandenburg*, 15 *Id.*, 363.

(r) It is not enough merely that the defendant cannot be found within the

State. Section 135 of the Code does not authorize an order for publication against a defendant who cannot be found, or whose last-known place of residence was within this State, but whose residence cannot at the time be ascertained, and who is not concealing himself with a fraudulent intent. *Close v. Van Heusen*, 6 *How. Pr.*, 157. Under such circumstances the proceeding may be by petition under the Revised Statutes, as amended by the *Laws of 1842*, 363, ch. 277. See *Form 126, infra*.

(s) As to making the affidavit on information and belief, see *Van Wyck v. Hardy*, 11 *Abbotts' Pr.*, 473; *S. C.*, 20 *How. Pr.*, 222.

(t) The residence of the defendants against whom service by publication is sought to be made, must be designated, or diligent and unsuccessful inquiry

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 Publication of Summons against Non-resident.
 

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III. That the said defendant has property in this State (*u*) as this deponent is informed and believes, to wit: a farm in \_\_\_\_\_, occupied by one M. N., who has informed this deponent that he paid rent therefor to the said Y. Z., who was the owner; and the said defendant has recently purchased goods in the city of \_\_\_\_\_, as this deponent is informed by said M. N., which goods are in the hands of one E. F., as the agent of the said defendant, and said E. F. is engaged in selling the same as the property of the said defendant. (*v*)

119. *Order for Publication, where Defendant is a Non-resident.*

[*As in Form 114, to the \*, and continue*] a cause of action exists against the defendant Y. Z., in favor of the above-named plaintiff, and that the defendant is not a resident of this State, but resides in \_\_\_\_\_, in the State of \_\_\_\_\_ [*or,*

as to such residence must be stated. *Cook v. Farmer*, 34 *Barb.*, 95; S. C., 12 *Abbotts' Pr.*, 359; 21 *How Pr.*, 286; affirming S. C., 11 *Abbotts' Pr.*, 40; *Hyatt v. Wagenright*, 18 *How. Pr.*, 248.

It may be stated thus:—That his residence is not known to the plaintiff, nor can it with reasonable diligence be ascertained by him; that for the purpose of ascertaining it he has inquired of M. N., the brother of the defendant, and as deponent is informed and believes his only relative residing in this State, who informs him that he is ignorant of the defendant's residence; but that he is not, as said M. N. believes, a resident of this State, and that his last-known place of residence was at \_\_\_\_\_.

(*u*) The Code gives the court no jurisdiction to order service of summons on a non-resident defendant by publication, unless he has property within the State when the order is made. *Fiske v. Anderson*, 33 *Barb.*, 71; S. C., 12 *Abbotts' Pr.*, 8.

(*v*) If the affidavit states the fact of defendant's property on information and belief, it must set forth the sources of information and grounds of belief. See *Evertson v. Thomas*, 5 *How. Pr.*, 45. Where plaintiff procured an order for publication of summons on an affidavit that defendant had property within this State, and it appeared, on motion to vacate the judgment, that such property consisted only of a team driven temporarily within the State with the purpose of returning forthwith,—*Held*, that the order for publication was irregular, and that plaintiff's proceedings must be set aside. *Haight v. Husted*, 5 *Abbotts' Pr.*, 170.

A debt which is due from a debtor who is not within this State to a creditor also not within this State is not liable to attachment here, although the evidence of that debt, *e. g.*, the bond, note, &c., may be within the State. *Bates v. New Orleans, &c., R. R. Co.*, 4 *Abbotts' Pr.*, 72. And such bonds it would seem are property within the meaning of this section.

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Affidavit for Publication against Absentees.

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and that his residence is not known and cannot with due diligence be ascertained], and that defendant cannot after due diligence be found within this State, but that he has property within this State [*continue as in Form 117, from the †*].

120. *Affidavit, where an Absent Defendant is a Proper Party to an Action respecting Specific Property.*

[*Title of the cause.*]

[*Venue.*]

A. B., plaintiff above named, being duly sworn says:

I. That this action is brought to foreclose a mortgage made on the                      day of                      , by the above-named defendant W. X., to this plaintiff to secure his bond of even date, conditioned for the payment of                      dollars, on certain real property in this State, consisting of a farm of about twenty acres, more or less, in the town of Rye, Westchester county. That the defendant Y. Z. has, or claims to have, some lien on or interest in said farm which accrued subsequent to said mortgage, and that a part of the relief which this plaintiff demands in this action is to exclude said defendant from any lien or interest in said property, and that said defendant Y. Z. is therefore, as he is advised, a proper party to this action. (*w*)

II. That said Y. Z. cannot after due diligence be found within this State. [*Here allege what efforts have been made to find him, and, if he is a non-resident, state that fact. See other forms.*] (*x*)

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(*w*) As the complaint has to be filed at the time the order of publication is obtained, it is well to annex the complaint, file it with the affidavit and order, which for that reason it is better to obtain at special term, and refer to it either in the affidavit or order, or both.

(*x*) As to publication in case of unknown parties in foreclosure, see the act of 1860, 209, ch. 131, adding a provision on this subject to section 135 of the Code.

As to proceeding against unknown owners in partition, see *Allen v. Allen*, 11 *How. Pr.*, 277.

## Publication of Summons.

121. *Order, where the Action relates to Specific Property.*

[*As in Form 114, to the \*, and continue*] that the defendant Y. Z. cannot after due diligence be found within this State, and that he resides at . . . , in the State of [or, that his residence is not known, and cannot with reasonable diligence be ascertained by the plaintiff], that he is a proper party to this action, which relates to real (y) property within this State, in which real property the said defendant Y. Z. has [or, claims] an interest [or, lien], and that the relief demanded by the plaintiff consists partly in excluding the said defendant from any lien on [or, interest in] said property. [*Continue as in Form 117, from the †.*]

122. *Affidavit, where the Action is for Divorce.*

[*Title of the cause.*]

[*Venue.*]

A. B., plaintiff above named, being duly sworn says:

I. That this action is brought for divorce in one of the cases prescribed by law, and that a cause of action therefor exists in her favor against the defendant above named, the grounds of which appear by the sworn complaint in this action hereto annexed, the statements contained in which are true [or, the grounds of which are as follows: *here state grounds of action showing that the case is within the statute of divorces*].

II. That the defendant cannot be found within this State, although diligent effort to find him and serve upon him the summons herein has been made. [*State what effort, and, if he is a resident of another State, allege such residence.*]

III. [*State his residence, if not before stated, or plaintiff's ignorance of it, as in Form 118.*]

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(y) If the action relates to personal property, substitute "personal" for "real," and insert a recital that it appears that a cause of action exists against the defendant, as in Form 114, *supra*

Order in Divorce Case.

In Partition.

123. *Order, where the Action is for Divorce.*

[*As in Form 114, to the \*, and continue*] that this action is brought for a divorce in one of the cases prescribed by law, and that the defendant cannot be found within this State after due diligence, and that he resides at \_\_\_\_\_, in the State of \_\_\_\_\_  
 [or, that his residence is not known, and cannot with reasonable diligence be ascertained by the plaintiff].

[*Continue, as in Form 117, from the †.*]

124. *Affidavit in Case of Unknown Owners.* (z)

[*Title of the cause.*]

[*Venue.*]

A. B., the plaintiff in the above-entitled action, being duly sworn says, that this action is brought for the partition of certain real property situated in the State of \_\_\_\_\_, in the county of \_\_\_\_\_, in which county the place of trial is laid, and of which real estate the plaintiff and defendant (except the defendant M. N., who has only a life-estate in an undivided part thereof), are seized in fee simple as tenants in common. \* That U. V., who was also a tenant in common, died, as this deponent is informed and believes, in the year 18 \_\_\_\_\_. That the names and residences of his widow and heirs-at-law are unknown to the plaintiff, and cannot, although he has made diligent inquiries for that purpose [*state what*], be ascertained. That their interest in the premises is an undivided part, being the share to which the defendant U. V. if living would have been entitled.

(z) Before the act of 1860 (784, ch. 459, § 4),—which added a provision for serving unknown owners in foreclosure by publication,—it was held that such parties in partition might be served in that way by proceeding as nearly as

possible in accordance with the other provisions of the law. *Allen v. Allen*, 11 *How. Pr.*, 277.

The above form may easily be adapted to the case of an action for foreclosure.



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 Publication of Summons against Unknown Parties.
 

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125. *Order, in Case of Unknown Owners.*

[*As in Form 114, to the \*, and continue*], that this action is brought for the partition of real estate, situate in . And that there are certain persons, to wit, the widow and heirs-at-law of U. V., deceased, who have an interest as tenants in common in said premises, and whose names and residences are unknown, and cannot with diligence be ascertained; on motion of Q. R., plaintiff's counsel,

ORDERED, that the summons herein, a copy whereof is hereto annexed, be served on such unknown owners by publication for six weeks, once in each week successively, in the State paper, to wit, the , published at Albany, (a) and also in the , a newspaper printed in the county of [*that in which the land lies*].

126. *Application for Order for Appearance of a Resident whose Place of Residence cannot be ascertained. (b)*

[*As in Form 124, to the \*.*]

That the last-known place of residence of W. X., one of the above-named defendants, was within this State, to wit, at ; but that he removed thence on or about , and his residence at this time cannot, on due inquiry, be ascertained by the plaintiff or his attorney, although they have diligently made such inquiry [*here state briefly what inquiry has been made, e. g., as follows: although they have made inquiries of his former neighbors and acquaintances at , his last-known place of residence, and of his father, who resides at , and his brother, who resides at .*].

[*Jurat.*]

[*Signature.*]

127. *Order for Publication in the Same Case.*

[*As in Form 114, to the \*.*]

That the last-known place of residence of the defendant Y. Z. was in this State; but that his residence at this time cannot, on

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(a) *Laws of 1854, ch. 197.*

provide for. *Laws of 1842, 363, ch*

(b) This form is only to be used 277; *Close v. Van Husen, 6 How. Pr.*  
in cases which the Code does not 157.

## Service of Summons.

due inquiry, be ascertained; on motion of Q. R., counsel for the plaintiff,

ORDERED [*continue as in Form 118, from the † to the §, directing the publication, however, to be for three months*]. (c)

## II. SUBSTITUTED SERVICE, UNDER THE ACT OF 1853. (d)

128. *Official Return, or Affidavit, of Inability to make Personal Service.*

[*Title, &c., unless this be a return indorsed on the process, (e) in which case no title is necessary.*]

[*Venue.*]

A. B., sheriff of \_\_\_\_\_ [or, deputy of the sheriff of \_\_\_\_\_, or, a constable of the town of \_\_\_\_\_], being duly sworn says [or, hereby returns]:

I. That Y. Z., the defendant [or, one of the defendants] in this action, resides (f) in this State, to wit, at \_\_\_\_\_, where his family now are [or, *state other fact showing that he has a residence there*].

II. That the deponent [or, *if it be a return*, the undersigned] has made proper and diligent effort to serve the process [or, paper] annexed, upon said Y. Z., by [*here set forth effort*]; but said Y. Z. cannot be found either in or out of the State, (g) nor

(c) The publication of the order should be in two newspapers, to be designated, as most likely to give notice to the persons to be served, and for a period of three months. (Compare *Code*, § 135, with *Laws of 1842*, 363, ch. 277. § 2, subd. 2.) *Close v. Van Husen*, 6 *How. Pr.*, 157.

(d) The act of 1853 (*Laws of 1853*, 974, ch. 511) empowers any court, any judge of the Supreme Court, and any county judge, to authorize any process or paper to be served on a defendant who is a resident of the State, and who cannot be found or evades service, by leaving a copy at his residence and mailing a copy to him. This act is not applicable to a defendant who is absent in the military or naval service

of the United States, except in partition cases, and in cases where no personal claim is made. *Laws of 1863*, 388, ch. 212.

(e) The proof should be by affidavit, unless the paper to be served is process which it was the duty of the officer to serve and return.

(f) See *Collins v. Ryan*, 32 *Barb.*, 647.

(g) To authorize service in this mode it must appear that the defendant is a resident of this State, but that he cannot be found, *either in or out of the State*, or that he evades service. If defendant is abroad from the State, in a known place, he cannot be served thus. *Collins v. Campfield*, 9 *How. Pr.*, 519; *Jones v. Derby*, 1 *Abbotts' Pr.*, 458; *Foot v. Harris*, 2 *Id.*, 454.

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Application for Order for Substituted Service.

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can the deponent [or, undersigned] ascertain when he will be at home, although he has made diligent inquiry of [or, but said Y. Z. avoids such service by keeping himself concealed; or, other mode of evading service, stating concisely the circumstances, so that the fact may "satisfactorily appear"]; so that the said process [or, paper] cannot be served personally, by proper diligence and effort. [Signature.]

[Jurat, if it be an affidavit.]

129. *Affidavit that the Defendant is not a Soldier, &c.*

[Title of the cause, Venue, and Commencement.]

That he is acquainted with Y. Z. the defendant in this action, referred to in the annexed affidavit [or, return] as being not found [or, avoiding service], and that said defendant is not an officer, soldier, or musician, actually absent from his place of residence, and actually engaged in the army or military service of the United States, nor a sailor or marine actually absent from his place of residence and actually engaged in the naval service of the United States, but that he is [*here state what is known of his occupation, to substantiate the denial that he is a soldier, &c.*] [Signature.]

[Jurat.]

130. *Affidavit to the Nature of the Action.*

[Title and Venue.]

A. B., the plaintiff's attorney in this action being duly sworn says, that this action is brought for partition of real estate, to wit [*here designate the property*], as appears by the complaint on file.

*Or, where no personal claim is made against the defendant in question,* says that this action is brought for the foreclosure of a mortgage upon lands [*or other object*], and that no personal claim is made in this action against Y. Z., the defendant mentioned in the foregoing affidavit [or, return], as being not found [or, as avoiding service], as appears by the complaint on file.

[Jurat.]

[Signature.]

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 Service of Summons.
 

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131. *Order for Substituted Service.*

[*Title of the cause.*]      [*May be made and entitled at special term, if preferred.*] (*h*)

It satisfactorily appearing by an affidavit [*or, return*] of M. N., the sheriff [*or, a deputy of the sheriff*] of the county of \_\_\_\_\_, [*or, constable of the town of* \_\_\_\_\_], that the summons [*or, other paper*] in this action, a copy of which is hereunto annexed, has been delivered to said M. N., to be served, and that the defendant Y. Z., named therein, is a resident of \_\_\_\_\_, in said county [*or, of said town*]; that said M. N. has made proper and diligent effort to serve the same personally upon him, and that such defendant cannot be found, either within or without this State [*or, that such defendant avoids, or, evades, such service*], so that the same cannot be personally served; and it further being shown to my satisfaction [*or, to the satisfaction of the court*] by the affidavit of \_\_\_\_\_, annexed, that Y. Z. is not an officer, soldier, or musician actually absent from his place of residence, and actually engaged in the army or military service of the United States, nor a sailor or marine actually absent from his place of residence, and actually engaged in the naval service of the United States;

*Or*, and it further being shown to my satisfaction [*or, to the satisfaction of the court*], that the action is one for the partition of real estate [*or, that no personal claim is made against said Y. Z.*];

On motion of Q. R., counsel for the plaintiff,

ORDERED, that the service of the said summons [*or, other paper*] be made by leaving a copy thereof at the residence of said defendant, in the town of \_\_\_\_\_, with some person of proper age, if admittance can be obtained, and such proper person found, who will receive the same, and if admittance cannot be obtained, or any such proper person found who will receive the same, then that the said service be made by affixing the same to the outer or other door of said residence, and by

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(*h*) Where summons is served in this mode, the affidavit and order must be filed, whether the order is made in court or not. *Rule 4.*

Proof of Service of Summons.

putting another copy thereof, properly folded or enveloped, and directed to the person to be served, at his said place of residence, into the post-office in the said town [*or, city*] where he resides, and paying the postage thereon. (i) [Signature.]  
[Date, if made at chambers.]

SECTION III.

PROOF OF SERVICE OF SUMMONS. (a)

I. PERSONAL SERVICE.

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II SERVICE BY PUBLICATION, ETC.

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(i) The words of the statute in respect to the mode of service, should be strictly pursued by the order. *Foot v. Harris*, 2 *Abbotts' Pr.*, 454.

(a) Service of summons upon an elector on an election day is void. *Meeks v. Noxon*, 1 *Abbotts' Pr.*, 280. And a judgment by default based on such a service, is irregular. *Bierce v. Smith*, 2 *Id.*, 411; and see *Hastings v. Farmer*, 4 *N. Y. (4 Comst.)*, 293. So service of a summons on Sunday is void. *Field v. Park*, 20 *Johns.*, 140. As to service on Saturday upon persons who observe that day as a holy day, see *Laws of 1847*, 451, ch. 349; *Marks v. Wilson*, 11 *Abbotts' Pr.*, 87.

When the summons is not legally

served, the court have no jurisdiction of the defendant, and proceedings based on the pretended service are void. *Bulkley v. Bulkley*, 6 *Abbotts' Pr.*, 307.

A resident of another State coming voluntarily into this State in good faith, for the sole purpose of being examined as a witness in an action to be tried in one of our courts, is exempt from the service of summons; and if one be served under such circumstances, or if a party be induced to come within jurisdiction by fraud for the purpose of serving him, the service will be set aside. *Seaver v. Robinson*, 3 *Duer*, 622; *Carpenter v. Spooner*, 2 *Sandf.*, 717.

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 Proof of Service of Summons.
 

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## I. PERSONAL SERVICE.

132. *Sheriff's Certificate of Service on the Defendant Personally.* (b)

[Title of the cause.] (c)

[Venue.]

I hereby certify that on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, (d) at \_\_\_\_\_, (e) I served on Y. Z. [one of the defendants], above named, (f) the [within] summons (g) [and complaint] in this action, by delivering a copy (h) thereof to him personally, (i) and leaving (j) the same with him.

[Date.]

[Signature.]

(b) An affidavit of service is not conclusive on the adverse party. *Van Rensselaer v. Chadwick*, 7 *How. Pr.*, 297; *Wallis v. Lott*, 15 *Id.*, 337. But a sheriff's certificate is held conclusive in the same proceeding. *Columbia Ins. Co. v. Force*, 8 *Id.*, 353. But compare *Campbell v. Self*, 2 *Id.*, 25, where it was allowed to be contradicted. A sheriff's certificate of service of summons and complaint does not lose its force by lapse of time, or by being used upon the entry of a judgment which is afterwards vacated. It may still be used on a second application for judgment. *Brien v. Casey*, 2 *Abbotts' Pr.*, 416.

(c) Where the proof of service is the sheriff's certificate, he should state or refer to the name of the cause, and show that the summons served by him was in that cause. *Litchfield v. Burwell*, 5 *How. Pr.*, 341.

(d) The certificate or affidavit should state the time and place of service with sufficient particularity to enable the party served to meet and disprove the allegation. See *Code*, § 138, subd. 4, last clause.

(e) The service of the summons must, except in the cases provided for in section 135, be within the territorial jurisdiction of the Court. *Litchfield v. Bur-*

*well*, 5 *How. Pr.*, 341. In the Superior Court of New York city, if the action be one of which the court has jurisdiction by subdiv. 1 of section 23 of the Code,—*e. g.*, an action for the partition or foreclosure of real property situated in the city, or in an action against several persons jointly liable on contract, when one of them resides, and is served in N. Y. city,—the summons may be served in any county of the State. *Porter v. Lord*, 4 *Abbotts' Pr.*, 43.

The certificate of a sheriff, of service out of his county, is not proof. *Farmers' Loan & Trust Co. v. Dickson*, 9 *Id.*, 61; *S. C.*, 17 *How. Pr.*, 477. The certificate of a sheriff of another State is not evidence in this State of service of papers from the courts of this State; his affidavit should be presented. *Thurston v. King*, 1 *Abbotts' Pr.*, 126; *Morrell v. Kimball*, 4 *Id.*, 352.

(f) Where the action is against husband and wife, service on the husband alone will be good service on both, unless relief be asked out of the separate estate, or upon an individual liability, of the wife, in which case she must be served. *Eckerson v. Vollmer*, 11 *How. Pr.*, 42.

(g) The sheriff's certificate is not proof of service of an order to appear and be examined in supplementary pro-

133. *Affidavit of Personal Service. (k)*[*Title of the cause.*][*Venue.*]

M. N., being duly sworn says, that he is a clerk in the office of plaintiff's attorney herein: and that on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, deponent then being of full age, [*or if a minor, state age*], he \* served on Y. Z., one of the defendants above named, at [his place of business] Number \_\_\_\_\_, Street, in the city of New York, the within summons [and complaint, *or*, notice of no personal claim], by delivering a copy thereof to him personally, and leaving the same

ceedings. It is not made evidence by the statute, and the order is not technically process. *Utica City Bank v. Buel*, 9 *Abbotts' Pr.*, 385; S. C., 17 *How. Pr.*, 498.

(*h*) There need not be an affidavit that the copy was a copy filed. *Central Bank v. Wright*, 12 *Wend.*, 190.

(*i*) It will be intended, where the sheriff returns that he served a copy on the defendant, that he served it personally. *Central Bank v. Wright*, 12 *Wend.*, 190.

(*j*) The copy-summons must be delivered to, and left with the defendant. *Rule 18.* A mere manual delivery of the summons is not good service, unless it be left with the defendant. Thus, where a defendant was served with a copy-summons, and after reading or examining the same, voluntarily handed it back to the person who had served it, and such person received it back without informing the defendant that he had a right to retain the same, and the plaintiff afterwards entered up judgment for default of an answer; the court on defendant's motion set aside the judgment, with costs. *Beekman v. Cutler*, 2 *Code R.*, 51; see, also, *Earl v. Chapman*, 3 *E. D. Smith*, 216; *Niles v. Vanderzee*, 14 *How. Pr.*, 547. Compare, also, *Davison v. Baker*, 24 *Id.*, 39. But where on a motion to set aside a judgment for irregularity, in being entered

without service of summons, it appeared that the summons was not served on the defendant, but by mistake on another party, as alleged in the affidavit of service; but the plaintiffs showed that the defendant had admitted that it was handed to him by the third party the next day, and more than twenty days before judgment; and that he consulted counsel as to whether the service was sufficient, it was held that there having been delay in making the motion, it should be denied without prejudice to renewal on the merits. *Wallis v. Lott*, 15 *How. Pr.*, 567.

And where on a motion to set aside a judgment taken for want of an answer, on the ground of a defect in the service of the summons, it appeared that the defendant had improperly endeavored to avoid service of the summons, the court refused to set aside the summons, except on satisfactory evidence that the summons had not come to the defendant's knowledge. *Southwell v. Marryatt*, 1 *Abbotts' Pr.*, 218; *Hilton v. Thurston*, *Id.*, 318. Compare *Williams v. Van Valkenburg*, 16 *How. Pr.*, 144.

(*k*) An affidavit of service of summons must show affirmatively a compliance with all the requirements of the law. *McMillan v. Reynolds*, 11 *Cal.*, 372

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 Proof of Service on Corporation.
 

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with him [*or*, by tendering a copy thereof to him personally, and on his refusal to receive the same, deponent laid them down upon his desk, saying to him, "I hereby deliver these to you, and thereupon left the same with him.]" (*l*) Deponent further says that he knows the person so served to be the person mentioned and described in the summons as defendant therein. (*m*)

[*Signature.*]

[*Jurat.*]

134. *Affidavit of Service on a Corporation.* (*n*.)

[*As in the preceding form to the asterisk, continuing as follows:*] served on the      Company, the within summons and complaint, by delivering a copy thereof to C. D., the president (*o*)

(*l*) Compare *Davison v. Baker*, 24 *How. Pr.*, 39. The affidavit must state when and at what particular place the summons was served. *Rule* 18. If served in a city, it should state the street and number. And it should state the time and manner of service so definitely that an indictment could be maintained against the party making it, if it were not true. *Van Wyck v. Reid*, 10 *How. Pr.*, 366.

(*m*) For the requisites of the affidavit of Service of Summons, &c., see *Rule* 23, of 1870.

(*n*) Service of process upon a foreign corporation, doing business in this State, may be made upon any person found within the State acting as their agent, unless by a designation filed in the office of the secretary of state, they have appointed some person in the county to receive service. *Laws of* 1855, 470, ch. 279. Service can be made on a foreign corporation only when it has property within the State, or the cause of action arose therein, or where it is made within this State personally upon the president, treasurer, or secretary. *Code*, § 134. And an action against a foreign corporation

can only be brought by a resident of this State, or by a non-resident when the cause of action shall have arisen, or the subject of the action shall be situated, within the State. *Code*, § 427. But the regularity of the service in such action does not depend upon proof being previously made of these facts, the existence of which is necessary to give the court jurisdiction of the action. The Code nowhere requires such proof to be made, or that any evidence shall be given in relation to such facts. But if the defendant objects that the case is not within these sections (§§ 134 and 427), then, to sustain the service, the plaintiff must show that the facts exist which render a service as prescribed by this section proper. *Bates v. New Orleans, &c., R. R. Co.*, 4 *Abbotts' Pr.*, 72.

(*o*) In an action against a corporation the copy-summons must be delivered to the president or other head of the corporation, secretary, cashier, treasurer, a director, or managing agent thereof. *Code*, § 134. The trustees of a religious corporation, and officers appointed by them, whose elections and appointments were in conformity with the for-



## Proof of Service on Infant, &amp;c.

[*or other officer upon whom it was served*] of said company, personally, and leaving the same with him. Deponent further says that he knows the person so served to be the president [*or other officer*] of the \_\_\_\_\_ Company, mentioned and described in the summons as the defendant therein.

135. *Affidavit of Service on a Minor (p) or Lunatic.* (q)

[*Title, Venue, and Commencement, as above.*]

That Y. Z., one of the defendants above named, is a minor under fourteen years of age [*or, has been judicially declared to*

malities prescribed by law, and who have in fact acted, and are acting as such, are at least officers *de facto*, upon whom alone valid service of process can be made. *Berrian v. Methodist Society*, 4 *Abbotts' Pr.*, 424. A managing agent is one whose agency extends to all the business of the corporation. *Brewster v. Michigan Central R. R. Co.*, 5 *How. Pr.*, 183. A baggage-master employed by a railroad company is not a managing agent. *Flynn v. Hudson River R. R. Co.*, 6 *Id.*, 308. A person acting under a power of attorney for an insurance company located elsewhere, and authorized to effect insurance, was held to be a managing agent. *Bain v. Globe Ins. Co.*, 9 *Id.*, 448.

And where a corporation defendant move to vacate a judgment for irregularity upon the ground that their agent, upon whom service was made, was not their "managing agent," they are bound—it being a matter peculiarly within their knowledge—to establish clearly that the agent served was not one upon whom service is authorized by section 134 of the Code to be made. 1854, *Donadi v. N. Y. State Mutual Ins. Co.*, 2 *E. D. Smith*, 519.

(p) If the action be brought against a minor under the age of fourteen, the summons must be served by being delivered to such minor personally, and

also to his father, mother, or guardian,—or if there be none within the State, then to any person having the care and control of such minor, or with whom he shall reside, or in whose service he shall be employed. *Code*, § 134, subd. 2.

(q) Service of summons on an insane person who has no committee, must be by a personal service on such person. *Heller v. Heller*, 1 *Code R., N. S.*, 309. But when a committee has been appointed, the summons must be served both on him and his committee. *Code*, § 134, subd. 3. But an action commenced against a lunatic without the permission of the court to sue, may be enjoined on the application of the committee. *Matter of Heller*, 3 *Paige*, 199; see *Matter of Hopper*, 5 *Id.*, 489. The proper mode of proceeding against a lunatic for whom a committee has been appointed, is to apply to the Supreme Court for an order directing the committee to pay the claim. If its justice is seriously disputed, a reference will be ordered, or the plaintiff will be permitted to bring his action. *Soverhill v. Dickson*, 5 *How. Pr.*, 109; *Matter of Hopper*, *supra*. See chapter of LEAVE TO SUE, *Ante*, 30. Formerly a judgment obtained in a court of law against a lunatic after the appointment of a committee, was not irregular. *Sternberg v. Schoolcraft*, 2 *Barb* 153; *Clarke*

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 Proof of Service by Publication.
 

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be of unsound mind, and a committee has been duly appointed for him], that E. F. is his father [*or*, that E. F., G. H., and J. K., are such committee]. That on [*&c.*, *stating date, place, and age of deponent, as in form 133*] this deponent served on said Y. Z., the within summons [and complaint,] by delivering to him a copy thereof, and leaving the same with him, and by delivering a copy thereof on the      day of      , 18      , at      , to said E. F., the father of said defendant, personally [*or*, to said E. F., G. H., and J. K., said committee, and each of them personally], and leaving the same with him [them]. Deponent further says that he knows the said Y. Z., so served, to be the person mentioned and described in said summons as the defendant therein, and said E. F. to be his father [*or*, and that said E. F., G. H., and J. K., are the committee appointed for him as aforesaid].

## II. SERVICE BY PUBLICATION, ETC.

### 136. *Printer's Affidavit.*

[*Title and Venue.*]

M. N., being duly sworn, says that he is the printer [*or*, the foreman of the printer, *or*, the principal clerk of the printer, *or*, the only (*r*) clerk of the printer]. of the      , a newspaper published in      , (*s*) and that the summons in this action, with the notice thereto appended, copies whereof are hereto an-

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*v. Dunham*, 4 *Den.*, 262. Nor would the court interfere to set aside a suit at law against him; but it was a contempt of the court of equity to proceed without leave first obtained from them. *L'Amoureux v. Crosby*, 2 *Paige*, 422; and cases, *supra*; and the action would be stopped by injunction from that court on application of the committee. But since the Code, the court will, on motion stay the suit, leaving the party to his remedy by petition. *Soverhill v. Dickson*, 5 *How. Pr.*, 109.

(*r*) An affidavit by a clerk, which shows that he is the only clerk, is sufficient, though not saying principal clerk. *Gray v. Palmer*, 9 *Cal.*, 616

It would seem, that if the affidavit is made by the publisher of the paper, it is sufficient. Similar language in the statute regulating foreclosures by advertisement, was so construed by *HAND, J. Bunce v. Reed*, 16 *Barb.*, 347. The complaint need not be published. *Anonymous*, 3 *How. Pr.*, 293; *S. C.*, 1 *Code R.*, 102.

(*s*) Where publication is ordered, the statute must be strictly pursued; and if the publication is made in a different paper than that directed by the court, it is void, without reference to the question whether defendant was prejudiced. *Brisbane v. Peabody*, 3 *How Pr.*, 109.

### Proof of Service by Publication.

nexed, were published in said paper once in each week for six successive weeks [*or other time, according to the statute*], (*t*) the first publication being on Monday, the      day of      , 18    , and the last upon Monday, the      day of      , 18    . (*v*)  
[*Jurat.*] [Signature.]

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137. *Affidavit of Mailing.* (v)

[*Title of court and cause.*]

[ *Venue.* ]

M. N., being duly sworn, says that he is managing clerk in the office of the attorney for the plaintiff in this action; that on the            day of            , 18    , (w) he deposited a copy of the annexed summons and complaint in this action in the post-office at            , (x), directed to Y. Z., one of the defendants above named [or, who is the president of W. X. Company, defend-

(*t*) Where an order for publication, by a clerical mistake required a longer publication than the statute called for, and the advertisement was continued only so long as the statute called for, — *Held*, that the decree was not on this account irregular. *Totten v. Stuyvesant*. 3 *Edw.* 500.

(u) It must appear by the affidavit that six entire weeks and the subsequent twenty days have elapsed since the first publication, and prior to the entry of judgment. See *Bunce v. Reed*, 16 *Barb.*, 347; *Richardson v. Bates*, 23 *How. Pr.*, 516.

(v) If after obtaining an order for service of summons upon a non-resident, by publication, personal service out of the State is effected, it becomes unnecessary to proceed to make publication, and to deposit the summons, &c., in the post-office. A personal service takes the place of those steps. *Abrahams v. Mitchell*, 8 *Abbotts' Pr.*, 123; disapproving *Litchfield v. Burwell*, 5 *How. Pr.*, 341; *S. C.*, 9 *N. Y. Leg. Obs.*, 182; *S. P.*, *Cornell v. Watson*, 1 *Edw.*, 82.

(w) A copy of the summons and complaint must be deposited in the post-

office forthwith, upon the making of the order for such service. Where the order for publication was made on the 24th of the month, and the copy-summons and complaint were not deposited in the post-office until the 9th of the following month, it was held not to be a deposit forthwith, and that a judgment subsequently entered on default of the defendant to answer, was irregular. *Back v. Crussell*, 2 *Abbotts' Pr.*, 386. In another case, it was held that delay in mailing from the 18th till the 22d, caused by waiting to have the papers printed, did not render the service irregular. Since the statute fixes no limit, *forthwith* should be construed as synonymous with all reasonable dispatch. *Van Wyck v. Hardy*, 11 *Abbotts' Pr.*, 473; S. C., 20 *How. Pr.*, 222.

(x) Service by mail, to be effectual as such, must be by mailing at the post-office at the residence of the attorney, and not that of his client or other person by whose hand the paper is mailed. *Schenck v. McKie*, 4 *How. Pr.*, 246; *S. C.*, 3 *Code R.*, 24; *Hurd v. Davis*, 13 *How. Pr.*, 57; *Peebles v. Rogers*, 5 *Id.*, 208; and see *Corning v. Gillman*, 1 *Barb. Ch.*, 649.

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 Proof of Substituted Service.
 

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ants above named], at \_\_\_\_\_, his place of residence, and  
 prepaid the postage thereon. [Signature.]  
 [Sworn.]

 138. *Affidavit of Substituted Service (Act of 1853).*

[Title of cause.]

[Venue.]

M. N., of \_\_\_\_\_, plaintiff's attorney in this action, being  
 duly sworn says, that on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at  
 Number \_\_\_\_\_, in \_\_\_\_\_ street, in the city of \_\_\_\_\_, he  
 served the summons in this action, of which a copy is hereto  
 annexed, upon the defendant Y. Z.,\* by leaving a copy thereof  
 at the residence of the said defendant aforesaid, delivering the  
 same to W. Z., whom he knew to be the wife of said defendant  
 [or, whom he knew to be the child of the defendant, and who  
 appeared to be of proper age to receive such service, to wit,  
 about the age of sixteen years], and who received the same;  
 and that deponent left said copy with said W. Z.; and fur-  
 ther, (y) that deponent, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_  
 at \_\_\_\_\_, put another copy of said summons, properly en-  
 veloped and directed to the defendant Y. Z., at his said place  
 of residence, into the post-office in said town, and paid the  
 postage thereon.

 139. *The Same, where Admittance could not be Obtained.*

[As in preceding form to the \*, and continue], by affixing the  
 same to the outer door [or, other door] of said residence, de-  
 ponent not being able to obtain admittance thereto, nor to find  
 any person of proper age at said residence who would receive  
 the same; and, further, that deponent on the \_\_\_\_\_ day  
 of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, put another copy of said  
 summons, properly enveloped and directed to the defendant Y.  
 Z., at his said place of residence, into the post-office in said  
 city, and paid the postage thereon.

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(y) It may be considered better to tion of the statute in this respect has  
 mail a copy of the process in all cases. been settled.  
 We are not aware that the construc-

### III. PROOF BY WRITTEN ADMISSION.

I admit due and personal service of the within summons [and complaint] upon me this                      day of                      , 18                      .(a)  
Y. Z., defendant.

141. *Proof of Signature.* (b)

On this                      day of                      , 18                      , before me came the above-named                      , to me personally known to be the person whose name is subscribed to the above admission as witness thereto, who, being by me sworn, said, that he resides in                      , and that on                      he saw said Y. Z. [*defendant*], to him personally known to be the defendant described therein, sign the same.                      [*Signature of officer.*]

On this                    day of                    , 18    , before me ap-  
 peared                    , to me personally known to be the defendant  
 described in, and who executed the foregoing admission, and  
 acknowledged that he executed the same.

[Signature of officer.]

(b) If an admission of service is made by a party who is not an officer of the court, the signature must be proved to

beguine. *Litchfield v. Burwell*, 5 *How. Pr.*, 341; *S. C.*, 9 *N. Y. Leg. Obs.*, 182; *Alderson v. Bell*, 9 *Cal.*, 315. But the want of an affidavit verifying an admission of service, must be objected to promptly; and the defect may be cured after judgment, by amendment. *Jones v. United States Slate Co.*, 16 *How. Pr.*, 129

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 Appearance.
 

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## SECTION IV.

## APPEARANCE. (a)

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143. *General Appearance, in Person.*[*Title of the cause.*]

To M. N., plaintiff's attorney.

Sir: Please take notice that I appear in this action.

Y. Z., defendant in person,

No. street,

City of .

144. *General Appearance, by Attorney.*[*Title of the cause.*]

To M. N., plaintiff's attorney.

Sir: Please take notice that I am retained by and appear for (b) the defendant [or, defendants; or, if not retained by all the defendants, the defendants U. V. and W. X.] in this action.

O. P., defendant's attorney [or, attorney for

defendants U. V. and W. X.],

No. street,

City of

145. *General Appearance and Demand of Copy-complaint.*[*Title of the cause.*]

To M. N., plaintiff's attorney.

Sir: Please take notice that I am retained by and appear for the defendant [W. X.] in this action; and demand that a

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(a) As to appearance where several executors or administrators are sued, see 2 *Rev. Stat.*, 448, § 5; and *Salters v. Pruyn*, 15 *Abbotts' Pr.*, 224.

(b) It was well settled before the Code, that a notice of retainer was not equivalent to an appearance, *De Wan-*

*delaer v. Coomer*, 6 *Johns.*, 328; *Vanderpool v. Wright*, 1 *Cow.*, 209; and the Code requires a notice of appearance. But Rule 11 provides that service of a notice of appearance or retainer, generally, shall be deemed an appearance.

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Special Appearance.

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copy of the complaint (c) be served on me at my office, No.  
street, in the city of .

O. P., attorney for the defendant W. X.

[*Address.*]

146. *Appearance for Special Purpose.*

[*Title of the cause.*]

To M. N., plaintiff's attorney.

Sir: Please take notice that I am retained by and appear for the defendant W. X. in this action, for the purpose of moving to vacate the attachment issued therein [*or, for the purpose of moving to set aside the complaint therein, or, other special purpose*].

O. P., attorney for defendant W. X. for  
the purpose aforesaid.

[*Address.*]

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(c) A notice of appearance in the action, stating that "I require all papers therein to be served on me,"—specifying a place for the service,—is a sufficient demand of service of a copy of the complaint. *Walsh v. Kursheedt*, 8 *Abbotts' Pr.*, 418; *Ferris v. Soley*, 23 *How. Pr.*, 422.

## CHAPTER VII.

## FORMAL PARTS OF PLEADINGS.

[For brevity, and for the convenience of the reader, those parts of pleadings which, though equally essential, are of a more formal nature than the statement of the cause of action or the character of the parties, are here presented by themselves, so that in the subsequent chapters, of COMPLAINTS, ANSWERS, &c., it may suffice to give the allegations of fact constituting a cause of action, or a defence, without making any reference to the title, the commencement, or the conclusion of the pleading.]

Pleadings exceeding two folios in length must have the folios marked. (a)

Copies of pleadings served on the adverse party should be perfect copies, including signature of counsel, the jurat, &c.: and the party has a right to presume that they are so, and proceed accordingly.] (b)

## I. FORMAL PARTS OF THE COMPLAINT.

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## II. FORMAL PARTS OF AN ANSWER.

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- 153. Commencement of answer by a defendant sued by a wrong name ..... 116
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## III. REPLY; AND DEMURRER.

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## IV. AMENDMENT.

- 161. Amended complaint ..... 119

(a) See page 1, *ante*. A pleading not folioed may be returned as irregular. *Strauss v. Par-*  
*ker*, 9 *Id.*, 342; but see *Blanchard v. Strait*, 8 *Id.*, 83.  
*Sawyer v. Schoonmaker*, 8 *How. Pr.*, (b) *Littlejohn v. Munn*, 3 *Paige*, 280.  
 198. It should not be set aside, on To same effect, *Lansing v. Pine*, 4 *Id.*,  
 motion, for that defect. 639.



Common Form of Complaint.

I. FORMAL PARTS OF THE COMPLAINT.

147. *Common Form.*

Supreme Court, (c) [City and] County of , (d)

[Names of all the plaintiffs], (e)  
 plaintiffs,  
 against  
 [Names of all the defendants], (f)  
 defendants.

(c) If the suit is brought in a local court, give the full title of the court,—*e. g.*, "The City Court of Brooklyn."

Where the summons and complaint are served together, and the name of the court appears in the summons, its omission from the complaint may be disregarded as a technical irregularity, which cannot injure the defendant. *Van Namee v. Peoble*, 9 *How. Pr.*, 198; *Van Benthuyssen v. Stevens*, 14 *Id.*, 70.

At common law it was held that the title of the court should appear in a declaration; but an omission was amendable. *Teal v. Tinney*, 2 *Id.*, 94.

(d) In an action in the Supreme Court the complaint is irregular, unless it states the place of trial. *Williams v. Wilkinson*, 1 *Code R.*, *N. S.*, 20; *Hall v. Huntley*, *Id.*, 21, *note*. The omission to state it is held not a mere irregularity. It is not waived by obtaining time to answer, nor can it be cured by reference to the summons. The complaint, in such case, must be amended, or stricken out as irregular. *Merrill v. Grinnell*, 10 *How. Pr.*, 31; *Hotchkiss v. Crocker*, 15 *Id.*, 336.

Naming the county in the title of the cause, as above, is a sufficient designation of the name of the county in which plaintiff desires the trial to be had. *Williams on Pl.*, 97; *Swan's Pl.*, 141; *Tappan v. Powers*, 2 *Hall*, 277; *Slate v. Post*, 9 *Johns.*, 81; *Barnes*, 483; 3

*T. R.*, 387; *Tidd's Pr.*, 433; 1 *Chit. Pl.*, 249; and see *Davison v. Powell*, 13 *How. Pr.*, 287.

(e) The caption should contain the names of all the parties, plaintiffs and defendants (*Code*, § 142); but see *note (f)*, *infra*. If they sue, or are sought to be charged in an official capacity, it is usual and proper that their character should be indicated here. See *Hill v. Thaxter*, 2 *Code R.*, 3; *S. C.*, *How. Pr.*, 407. This does not, however, take the place of the averments necessary in the body of the complaint, to show the official character. See Chapter IX., Section I., of AVERMENTS OF OFFICIAL CHARACTER AND CAPACITY, where this subject is treated.

(f) It was the rule in Chancery that a bill must state clearly the persons who are made defendants; either by praying process against them, or by a distinct allegation designating the persons impleaded as defendants. *Elmendorf v. Delancey*, *Hopk.*, 555; *S. P.*, *Verplanck v. Mercantile Ins. Co.*, 2 *Paige*, 438. In an action under the Code, corresponding to the non-bailable actions of the former practice, if several defendants are joined in the summons, but only one served, the complaint may be against the latter only, omitting the names of the others. *Travis v. Tobias*, 7 *How. Pr.*, 90. See *Form* 149, *i infra*. A defendant should not be

## Common Form of Complaint.

The plaintiff above named, complaining of the defendant, (g) alleges:

[*Here set forth the cause of action.*] (h)

Wherefore the plaintiff [*or, plaintiffs*] demands judgment (i)

sued by a fictitious name, unless the plaintiff is ignorant of his true name. *Crandall v. Beach*, 7 *How. Pr.*, 271. In such case, the plaintiff's ignorance must be alleged, or the misnomer will be a ground for vacating his proceedings. *Elliott v. Hart*, *Id.*, 25; *Waterbury v. Mather*, 16 *Wend.*, 611.

(g) It is sufficient, when parties have been once named in the pleading, to describe them afterwards by the terms "said plaintiff" and "said defendant." *Davidson v. Savage*, 6 *Taunt.*, 121; *S. C.*, 1 *Eng. Com. L. R.*, 537; *Stevenson v. Hunter*, 6 *Taunt.*, 406; *S. C.*, 1 *Eng. Com. L. R.*, 675. And this rule applies equally where the plaintiff sues in a special character, beginning his pleading by showing his character. *Stanley v. Chappell*, 8 *Cow.*, 235; *Ketchum v. Morrell*, 2 *N. Y. Leg. Obs.*, 58; but compare *Christopher v. Stockholm*, 5 *Wend.*, 36.

(h) If the pleading is to be verified, such of its allegations as are made not from knowledge but upon information, should be distinguished by the phrase, "alleges upon information and belief." The authorities are conflicting on this point, but this we deem the more reasonable, and the usual practice. Compare *Howell v. Fraser*, 6 *How. Pr.*, 221; *Bement v. Wisner*, 1 *Code R., N. S.*, 143; *Fry v. Bennett*, 5 *Sandf.*, 54; *S. C.*, 9 *N. Y. Leg. Obs.*, 330; 1 *Code R., N. S.*, 238; *Radway v. Mather*, 5 *Sandf.*, 654; *Borrowe v. Milbank*, 5 *Abbotts' Pr.*, 28; *Ricketts v. Green*, 6 *Id.*, 82; *N. Y. Marbled Iron Works v. Smith*, 4 *Duer*, 362; *Truscott v. Dole*, 7 *How. Pr.*, 221; *Finnerty v. Barker*, 7 *N. Y. Leg. Obs.*, 316; *St. John v. Beers*, 24 *How. Pr.*, 377; *Woodruff v. Fisher*, 17 *Barb.*, 224; *Grim v. Wheeler*, 3 *Edw.*,

334; *Norton v. Woods*, 5 *Paige*, 260; *Equity Rule 4 of 1847*. Where the pleading is wholly on information, it will be sufficient to indicate it in the preceding line, once for all.

In Chancery, where a bill was to be verified by an agent or attorney, it was required to be drawn in the same manner as bills sworn to by the complainant himself; stating those matters which were within the personal knowledge of such agent or attorney positively; and those which he had derived from the information of others being stated or charged upon the information and belief of the complainant. *Bank of Orleans v. Skinner*, 9 *Paige*, 305.

(i) A complaint setting out the cause of action, and adding, "to the damage of the plaintiffs, \$3,000, and thereof they bring suit," is good, without any more specific prayer for relief. *Tuolunne, &c., Co. v. Columbia, &c., Co.*, 10 *Cal.*, 193.

The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint. *Code of Pro.*, § 275. It is not enough that he has stated in the complaint facts entitling him to the relief. *Simonson v. Blake*, 12 *Abbotts' Pr.*, 331; *S. C.*, 20 *How. Pr.*, 484; *Hurd v. Leavenworth*, 1 *Code R., N. S.*, 278. And this rule is applied on demurrer. *Walton v. Walton*, 32 *Barb.*, 203; *S. C.*, 20 *How. Pr.*, 347; *sub nom.* Anonymous, 11 *Abbotts' Pr.*, 231. But where there is an answer, the demand for relief becomes immaterial, and the court may grant him any relief consistent with the case made by the complaint, and embraced within the issue. *Code of Pro.*, § 275; *Van Dyke v. Jackson*, 1 *E. D. Smith*, 419; *Jones v. But*

Ordinary Complaint.

against the defendant [*or*, defendants] for the sum of (*j*)  
dollars and cents, together with interest  
thereon (*k*) from the day of , 18 , [*or*,  
*when the action is for the recovery of sums which became pay-  
able at different times, say*, with interest on dollars  
thereof, from the day of , 18 , and with  
interest on dollars thereof, from the day  
of ], together with the costs of this action. (*l*)

[*Signature.*] (*m*)

[*Verification. See Chapter VIII., infra.*]

ler, 30 *Barb.*, 641; S. C., 20 *How. Pr.*, 189; *Emery v. Pease*, 20 *N. Y.*, 62; *Marquat v. Marquat*, 12 *N. Y.* (2 *Kern.*), 336; reversing S. C., 7 *How. Pr.*, 417.

In general a demand for judgment in the alternative is improper. *Maxwell v. Farnam*, 7 *How. Pr.*, 236; *Durant v. Gardner*, 10 *Abbotts' Pr.*, 445; S. C., 19 *How. Pr.*, 94; and compare *Warwick v. Mayor, &c.*, of N. Y., 28 *Barb.*, 210; S. C., 7 *Abbotts' Pr.*, 265; *People v. Mayor, &c.*, of N. Y., 28 *Barb.*, 240; S. C., 8 *Abbotts' Pr.*, 7. But in actions for equitable relief, it is held that the complaint may be framed with a double aspect, when there is doubt as to the particular relief to which the plaintiff is entitled. *Young v. Edwards*, 11 *How. Pr.*, 201. A demand for general relief is inconsistent with a demand for judgment in a specified sum in an action for a money-demand on contract. *Durant v. Gardner*, 10 *Abbotts' Pr.*, 445; S. C., 19 *How. Pr.*, 94.

(*j*) If the recovery of money is demanded, the amount must be stated. *Code of Pro.*, § 142, subd. 3. Whenever damages are recoverable, the plaintiff may claim and recover, if he shows himself entitled thereto, any rate of damages which he might have heretofore recovered for the same cause of action. *Id.*, § 276. Damages not the immediate and natural consequences of an unlawful act, or which the law would not presume necessarily to flow from it,

must be specially stated. Such averments are not traversable, but they are necessary in the complaint, that the defendant may not be taken by surprise. They, therefore, are not to be struck out, on motion, as irrelevant. *Molony v. Dows*, 15 *How. Pr.*, 261. Matters merely in aggravation of damages are not pleadable, and may be struck out. *Ib.* For demand for special relief, see the forms of complaints, *infra*.

(*k*) The amount of interest need not be stated. *Spurrier v. Briggs*, 17 *Ind. (Harr.)*, 529. When the action is for unliquidated damages, omit the demand for interest.

(*l*) It is usual to insert here a demand for costs; but we consider it unnecessary, for the costs form no part of the relief to which the cause of action entitles the plaintiff. They are simply an incident to his recovery, which the statute awards to him, of course, as the successful party.

It is not necessary that the complaint should be dated, or show the time of the commencement of the action. *Maynard v. Talcott*, 11 *Barb.*, 569.

(*m*) Every pleading in a court of record must be subscribed by the party, or his attorney. *Code of Pro.*, § 156. It has been held that the signature of the party or attorney to the verification was a sufficient subscription of a pleading. *Hubbell v. Livingston*, 1 *Code R.*, 63. In an action by an infant who ap-

## Complaint.

148. *The Same, setting forth Several Causes of Action.*

The plaintiff above named, complaining of the defendant, alleges:

*First:* For a first cause of action, (n)

I. That, &c., &c.

*Second:* (o) And for a second cause of action,

I. That, &c., &c.

149. *Against one Defendant Severally Liable, (p) where the Action is Severed.*

The plaintiff, suggesting to the court that the summons in this action has not been served on the defendant W. X. named therein, complains against the defendant Y. Z., and alleges:

appears by guardian, his summons and complaint are regular if signed by the attorney instead of his guardian. *Hill v. Thaxter*, 3 *How. Pr.*, 407; *S. C.*, 2 *Code R.*, 13. He may sign as "attorney for the plaintiff." 2 *Burrill's Pr.*, 80.

(n) Unless a complaint which seeks to recover upon two causes of action shows how much is due upon each, it will be ordered to be made more definite and certain. *Clark v. Farley*, 3 *Duer*, 645; *Buckingham v. Waters*, 14 *Cal.*, 146. But the omission to aver damages in the complaint, is waived by going to trial without objection. *Neary v. Bostwick*, 2 *Hill.*, 514.

(o) Separate causes of action must be separately stated. The causes of action required to be separately stated are such as, by law, entitle the plaintiff to separate actions. *Sturges v. Burton*, 8 *Ohio (St.)*, 215. See, also, *Form 202, note*. And the statement of a separate cause of action, or defence, should begin with appropriate words to designate it as such. *Benedict v. Seymour*, 6 *How. Pr.*, 298; *Lippencott v. Goodwin*, 8 *Id.*, 242. They must each be plainly numbered. *Rule 19*. As to the remedy for a defect in these respects, compare *Blanchard v. Strait*,

8 *How. Pr.*, 83; *Wood v. Anthony*, 9 *Id.*, 78. Each statement must be complete, either by containing all necessary allegations, or by expressly referring for some of them to other parts of the pleading. The plaintiff cannot avail himself of an allegation in the statement of one cause of action, not thus referred to, so as to sustain a defect in the statement of another cause of action. *Sinclair v. Fitch*, 3 *E. D. Smith*, 677; *Landau v. Levy*, 1 *Abbotts' Pr.*, 376; *S. P.*, *Loosey v. Orser*, 4 *Bosw.*, 391; *Ritchie v. Garrison*, 10 *Abbotts' Pr.*, 246. As to alleging several breaches of one contract, see *Rowland v. Phalen*, 1 *Bosw.*, 43. It was the rule at common law, that the plaintiff might refer in one count to preceding parts of the declaration, and so support it. *Freeland v. McCullough*, 1 *Den.*, 414; *Crookshank v. Gray*, 20 *Johns.*, 344; *Griswold v. National Ins. Co.*, 3 *Cow.*, 96; *Loomis v. Swick*, 3 *Wend.*, 205; and see, as to money counts, *Porter v. Cummings*, 7 *Id.*, 172.

(p) Where the liability is a joint in indebtedness upon contract the judgment will be joint; and in such case the practice is to entitle the complaint against all, as if all were served.

## Commencement of Complaints.

150. *Where Judgment by Default has been had against a Defendant. (q)*

The plaintiff, suggesting to the court that the summons in this action has been served on the defendant, W. X., but that he has not appeared, and that by reason thereof judgment has been taken against him, in respect of the premises, thereupon complains against the defendant Y. Z., and alleges :

151. *In an Action removed from a Justice's Court, on a Plea of Title to Land.*

Whereas, an action was brought by A. B. against Y. Z., in \_\_\_\_\_, before M. N., a justice of the peace in and for the town of \_\_\_\_\_, in the county of \_\_\_\_\_, which action was discontinued upon an answer setting forth matter showing that the title to real property would come in question, (r) the plaintiff now in this court complains of the defendant Y. Z. for the same cause of action, and alleges :

## II. FORMAL PARTS OF AN ANSWER.

152. *Common Form, by a Sole Defendant.*

[*Title of cause.*] (s)

The defendant [by M. N., his attorney], (t) answering the complaint herein, alleges [*or, denies*] :

(q) From *Bullen & L. F.*, 6.

(r) As to the necessity of setting forth the proceedings in the justice's court, and that appearing at the trial is a waiver of an omission to do so, see *Clyde & Rose Plank-road Co. v. Parker*, 22 *Barb.*, 323 ; The same *v. Baker*, 12 *How. Pr.*, 371.

(s) The Code does not require the answer to contain the title of the cause ; but the propriety of inserting it is obvious. The old usage of reversing the parties' names in writing the title of the cause in papers served on behalf of the defendant, giving the names in the title of an answer thus, for instance, "A" (the defendant), "at suit of" or

"ads." "B" (the plaintiff), is abandoned under the Code, and is so far forgotten among clerks of courts, that we have once or twice known a defendant's attorney, after recovering a verdict in favor of his client, to procure judgment to be rendered against him, by the accident of sending the papers to the clerk having the defendant's name indorsed preceding the plaintiff's ; whereupon the clerk has entered the judgment against the party first named in the title, supposing him to be, of course, the plaintiff.

(t) This may be omitted where he has served a notice of appearance. The old rule, that the pleadings should

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 Commencement of Answers.
 

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[*Here set forth defences and counter-claims, separately stating and numbering them.*]

Wherefore the defendant demands, (u) &c.

[*Signature.*] (v)

[*Verification, if the complaint is verified.*]

153. *Commencement of Answer by a Defendant sued by a Wrong Name.*

This defendant, Y. Z., in the summons and complaint in this action called G. E., answering the plaintiff's complaint herein, alleges [*or, denies*]:

154. *The Same, by an Infant.*

This defendant, an infant under the age of twenty-one years, by C. D., his guardian, answering the plaintiff's complaint herein, alleges [*or, denies*]:

155. *The Same, by a Lunatic, &c.*

The defendant, Y. Z., a lunatic [*or, a person of unsound mind, or, an idiot, or, an habitual drunkard*], by M. N., his committee and guardian, answering the plaintiff's complaint herein, alleges [*or, denies*]:

---

state the names of the pleader's attorneys (2 *Rev. Stat.*, 351) was satisfied, where there were two attorneys partners, by the firm-name, without the Christian name of each. *Bank of Geneva v. Rice*, 12 *Wend.*, 424.

(u) No demand of relief is necessary unless the defendant seeks some affirmative relief against the plaintiff or against a co-defendant. But a defendant's prayer for relief will not be struck

out as irrelevant, for the plaintiff cannot be prejudiced by it. *Averill v. Taylor*, 5 *How. Pr.*, 476.

(v) A verified answer is defective if neither the answer nor the verification are subscribed. *Laimbeer v. Allen*, 2 *Sandf.*, 648; *S. C.*, 2 *Code R.*, 15. The subscription of the verification of the pleading is a sufficient subscription of the pleading. *Hubbell v. Livingston*, 1 *Id.*, 63.

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Complaints and Answers where there are Several Parties.

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156. *The Same, by Husband and Wife, jointly.*

Y. Z., one of the above-named defendants, and X. Z., his wife, answering the plaintiff's complaint in this action, jointly allege [*or, deny*]:

157. *Title and Commencement, by One Defendant answering separately.*

[*Name of court.*]

<p>[<i>Names of all the plaintiffs</i>],  <div style="text-align: right;">plaintiffs,</div> <div style="text-align: center;">against</div> <p>John Doe [<i>answering defendant</i>],          impleaded with (<i>w</i>) Richard Roe,          and others, defendants.</p> </p>	}	.
--	---	---

The defendant John Doe, answering the complaint herein, alleges [*or, denies*]:

158. *Answer containing Several Defences.*

[*Title and Commencement as above.*]

*First.* (*x*) For a first defence, to the first alleged cause of action: (*y*)

[*Here set forth the facts constituting it.*]

*Second.* For a further defence:

[*Here set forth the facts constituting it, except that if any of them have been alleged above, an express reference to those allegations will suffice instead of a repetition of them.*] (*z*)

(*w*) Where there are many defendants, and one of them answers alone, or but a few answer together, it is a convenient practice to entitle the papers of the answering defendant in this way.

(*x*) In all cases of more than one distinct cause of action, defence, counter-

claim, or reply, the same must not only be separately stated but plainly numbered. *Rule 19.*

(*y*) A defence must refer to the cause of action which it is intended to answer. (*Code, § 150.*) No particular form of words is requisite, however.

(*z*) Each defence in an answer, which

## III. REPLY, AND DEMURRER.

159. *Reply setting up Several Defences to Several Counter-claims.*[*Title of cause.*]

The plaintiffs, replying to the answer of the defendants [*names of the answering defendants*] herein, alleges:

I. As to the first counter-claim, (a)

*First.* The plaintiffs severally deny, each for himself, that he has any knowledge or information sufficient to form a belief as to the allegations of the answer respecting the same.

*Second.* For a second defence to said counter-claim, the plaintiffs allege [*stating new matter in defence*].

II. As to the second counter-claim,

The plaintiffs deny each and every allegation of the answer respecting the same.

[*Signatures.*][*Verification.*]160. *Demurrer to Complaint. (b)*[*Title of cause.*]

The defendant Y. Z. demurs to the complaint herein [*or, to the first alleged cause of action in the complaint herein*], and for the grounds of his demurrer states, that it appears upon the face of the complaint [*state ground as in chapter of DEMURRERS, infra*].

[*Signature.*]

is declared to be a distinct defence, must be complete in itself, and must contain all that is necessary to answer the whole cause of action, or that part of it which it professes to answer, either by express allegation, or by a distinct reference to other parts of the answer. *Loosey v. Orser*, 4 *Bosw.*, 391; *S. P.*, *Ayres v. Covill*, 18 *Barb.*, 260. But a defect in this respect is not available after verdict. *Ayrault v. Chamberlain*, 33 *Barb.*, 229.

(a) It is only to new matter in the

answer, constituting a counter-claim, that the plaintiff can reply. *Code*, § 153.

(b) The formal parts of the plaintiff's demurrer to a counter-claim or other new matter pleaded as a defence in the answer, and the formal parts of the defendant's demurrer to the reply, are the same as above, *mutatis mutandis*.

The demurrer to a reply may be founded on the ground merely that it was departure from the complaint. *White v. Joy*, 11 *How. Pr.*, 36.



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 Amendments.
 

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## IV. AMENDMENT.

161. *Amended Complaint.*[*Title of cause.*]

The plaintiff by this his amended complaint alleges: (c)

[*Set forth cause of action as in an original complaint.*] (d)

(c) In Chancery it was the practice, if the amendments were not of a nature to require the original bill to be re-engrossed, to annex the amendments to the bill, and have a reference to them made in that part of the bill where the amendments should have been inserted, and reference made, at each amendment, to the proper place for its insertion in the original bill. *Luce v. Graham*, 4 *Johns. Ch.*, 170. If a party thought fit to serve an entire new bill, incorporating the original matter with the amendments, he was required to mark distinctly the latter, or the defendant could refuse to receive it. *Bennington Iron Co. v. Campbell*, 2 *Paige*, 159. So, it was held that an answer to an amended bill should not repeat the matter of the former answer (*Bennington Iron Co. v. Campbell*, 2 *Paige*, 159; *Bard v. Chamberlin*, 5 *Ch. Sent.*, 73), unless the grounds of the suit and the defence were varied in substance. *Bowen v. Idley*, 6 *Paige*, 46. An amendment of a defective jurat was not complete until the amended jurat was served. *Taylor v. Bogert*, 5 *Paige*, 33.

At law, too, where a party's motion to amend the pleading of the opposite party was granted—*e. g.*, a motion to strike out the names of lessors in ejectment, wrongly inserted, the practice was for him to serve on the opposite party a certified copy of the rule, and

this was deemed an actual amendment, as to all subsequent proceedings on the part of the latter, without service of an amended pleading; and authorized an actual amendment of the declaration on file, or filing a new one whenever necessary. *Jackson v. Belknap*, 7 *Johns.*, 300.

Under the Code it is the practice where a party amends his pleading either of course, or after obtaining consent or leave, to serve a new pleading; and it supersedes the original. It is the practice, too, to designate it on its face as an amended complaint or answer, as the case may be; though it has been held that the omission so to designate it does not render it void. *Hurley v. Second Building Association*, 15 *Abbotts' Pr.*, 206, *note*.

(d) An amendment must be substantial, not merely verbal. *Snyder v. White*, 6 *How. Pr.*, 321. Adding a verification to a complaint is not an amendment. *George v. McAvoy*, 6 *Id.*, 200. It may add a new cause of action. *Mason v. Whitely*, 4 *Duer*, 611; *S. C.*, 1 *Abbotts' Pr.*, 85; and see *Wyman v. Redmond*, 18 *How. Pr.*, 273; *Macqueen v. Babcock*, 13 *Abbotts' Pr.*, 268. Or strike out a cause of action. *Watson v. Rushmore*, 15 *Id.*, 51. An amended pleading cannot set up matter which occurred after suit brought. *Hornfager v. Hornfager*, 6 *How. Pr.*, 13; *Lampson v. McQueen*, 15 *Id.*, 345.

## CHAPTER VIII.

## VERIFICATIONS. (a)

I. BY SOLE PLAINTIFF OR DEFENDANT.	
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(a) A defect in the verification of a complaint does not render the complaint irregular. Even if the defect is apparent upon the face of the verification, it only operates to relieve the defendant from the obligation to verify his answer. *Fitch v. Bigelow*, 5 *How. Pr.*, 237; *Van Horne v. Montgomery*, *Id.*, 238; *Lane v. Morse*, 6 *Id.*, 394; *Waggoner v. Brown*, 8 *Id.*, 212; *Quin v. Tilton*, 2 *Duer*, 648; *Strauss v. Parker*, 9 *How. Pr.*, 342; *Treadwell v. Fassett*, 10 *Id.*, 184; *Hubbard v. National Protection Ins. Co.*, 11 *Id.*, 149; *Williams v. Riel*, 11 *Id.*, 374.

If the defect be latent, the defendant's relief must be by motion. *Gilmore v. Hempstead*, 4 *How. Pr.*, 153.

The Code of 1848 (§ 133) provided that the verification to any pleading might be omitted where the party would be privileged from testifying to the same matter. The Code of 1849 omitted this provision altogether. The Code of 1851 (§ 157) provides that "the verification may be omitted when an

admission of the truth of the allegations might subject the party to prosecution for felony." The act of 1854 (*Laws of 1854*, 153) provides that the verification of any pleading may be omitted in all cases where the party called upon would be privileged from testifying as a witness to the truth of any matter denied by such pleading. The only authority under the Code of 1848 is *Clapper v. Fitzpatrick* (1 *Code R.*, 69), in which it was held that it was enough to excuse any defendant from verifying, if any part of the answer contained statements to which he or any of his co-defendants would be privileged from testifying. Under the Code of 1849, which contained no provision on the subject, it was held that by the Constitution (*Const.*, art. 1, § 6), and according to general principles of law, where a verified answer would subject the defendant to a criminal prosecution, he might, in the absence of any statutory provision, serve a verified answer in which he might decline

I. BY SOLE PLAINTIFF OR DEFENDANT.

162. *Common Form.* (b)

[*Venue.*]

A. B., the plaintiff [*or, defendant*] above named, being duly sworn, says that the foregoing complaint [*or, answer*] is true, (c) to his own knowledge (d) [*except as to those matters therein*

to answer such matters, upon that ground, and that such a refusal would be treated as a denial. *Hill v. Muller*, 2 *Sandf.*, 684; *White v. Cummings*, 3 *Id.*, 716; *S. C.*, 1 *Code R., N. S.*, 107. The decisions under the Code of 1851 are *Thomas v. Harrop*, 7 *How. Pr.*, 57; and *Springsted v. Robinson*, 8 *Id.*, 41. In the latter case a verified answer in the form prescribed by *Hill v. Muller*, and *White v. Cummings* (*supra*), was held frivolous, and it was said that when the court could not see from the pleadings themselves that the admission of the allegations in the complaint would subject the defendant to a criminal prosecution, he might show that fact by affidavit. The only cases under the act of 1854, are *Scoville v. New*, 12 *How. Pr.*, 319; *Lynch v. Todd*, 13 *Id.*, 547; *Wheeler v. Dixon*, 14 *Id.*, 151; *Anable v. Anable*, 24 *Id.*, 92; *Moloney v. Dows*, 2 *Hilt.*, 247; *Blaisdell v. Raymond*, 5 *Abbotts' Pr.*, 144.

Where it appears by the allegations of the complaint that the truth of the matter charged might tend to subject the defendant to criminal prosecution and punishment, or penal liability, he may answer, denying allegations of the complaint without a verification, and it is not necessary to obtain leave of the court for the purpose.

If the question of privilege is of such a nature that it would not appear by a mere denial of the averments in the complaint, then the defendant should put in a verified answer, setting forth, analogous to the former plea in equity,

the grounds or reasons why he is excused from answering any of the averments in the complaint. *Moloney v. Dows*, 2 *Hilt.*, 247.

In *Anable v. Anable* (24 *How. Pr.*, 92), it was held that the husband's loss of a possibility of an estate in his wife's lands, which would result from a decree of divorce against him for his fault, was a "penalty or forfeiture" within the meaning of the rule which makes a witness privileged. But compare, however, *Babbott v. Thomas*, 31 *Barb.*, 277.

(b) In an action by an infant appearing by a guardian *ad litem*, the complaint may properly be verified by the guardian, and he need not do so as the agent or attorney for the infant, but may do so as the plaintiff. *Anable v. Anable*, 24 *How. Pr.*, 92.

(c) A verification alleging that "the same is substantially true," &c., was held insufficient as containing a qualification that was a material departure from the requirements of the Code. *Waggoner v. Brown*, 8 *How. Pr.*, 212.

(d) In *Southworth v. Curtis*, 6 *How. Pr.*, 271; *S. C.*, 1 *Code R., N. S.*, 412, a verification omitting the words "to his knowledge," was held sufficient; but the same defect was adjudged fatal in *Williams v. Riel*, 11 *How. Pr.*, 375; and in *Tibbals v. Selfridge*, 12 *Id.*, 64. In *Van Horne v. Montgomery*, 5 *Id.*, 238, an allegation that "the same is true according to the best of his knowledge and belief," was held insufficient.

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 Verification by Officer of Corporation.
 

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stated on information and (e) belief, and as to those matters he believes it to be true]. (f) [Signature.] (g)

[Jurat.]

163. *By Officer (h) of Corporation.*

[Venue.]

A. B., being duly sworn, says that he is president of the \_\_\_\_\_ Company, plaintiffs [or, defendants] above named, and that the foregoing complaint is true to his own knowledge [except as to those matters therein stated on information and belief, and as to those matters he believes it to be true]. Deponent further says (i), that the reason why the verification is not made by the plaintiffs is that they are a corporation; that this deponent is an officer of the same, to wit, president, and that his knowledge is derived from having witnessed the transactions mentioned in the complaint [or, from the admissions of the defendant, or, other sources of personal knowledge, and where a portion or all of the material allegations are

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(e) In the Code of 1849, the word "or" stood in the place of "and;" and under that Code it was held that a verification using the word "and" instead of "or" was defective. *Davis v. Potter*, 4 *How. Pr.*, 155.

(f) Where a pleading states nothing on information and belief, this exception may be omitted from the verification. *Kinkaid v. Kipp*, 1 *Duer*, 692; *Ross v. Longmuir*, 15 *Abbotts' Pr.*, 326; *Patterson v. Ely*, 19 *Cal.*, 28.

In *Harnes v. Tripp*, 4 *Abbotts' Pr.*, 232, it was held that when the complaint was entirely upon information and belief, the proper form of the verification was, "deponent believes the same to be true, all the allegations therein being made on information and belief."

It is, however, a common practice to use a form like the one given above, as well for pleadings which are entirely on information and belief, as well as those that are direct, or partly direct, and partly on information and belief.

(g) The verification must be subscribed by the party making it. *Lajmbeer v. Allen*, 2 *Sandf.*, 648; S. C., 2 *Code R.*, 15.

(h) A managing agent of a corporation, upon whom, under section 132 of the Code, the summons is served, is to be deemed an officer of the corporation within the provision of section 157, allowing an officer to make the verification of the pleading of a corporation. *Glaubenskle v. Hamburg & American Packet Co.*, 9 *Abbotts' Pr.*, 104.

(i) It is common to add, as in the form above, a statement of the grounds of knowledge of the officer, but it was held in *Glaubenskle v. Hamburg & American Packet Co.* (9 *Abbotts' Pr.*, 104), that a verification made by an officer of a corporation, is the verification of the corporation, and need not state the deponent's ground of belief or sources of knowledge. Compare, also, *Van Horne v. Montgomery*, 5 *How. Pr.*, 238; *Anable v. Anable*, 24 *Id.*, 92.

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By Several Parties.

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*on information and belief, may add, or substitute, the following clause:—that the grounds of his belief are information communicated to him by the agents of said corporation, or, other sources of information].*

[Signature.]

[Jurat.]

II. WHERE THERE ARE SEVERAL PLAINTIFFS OR DEFENDANTS.

164. *By one of several Persons united in Interest, and Pleading together.*

[Venue.]

A. B., one of the plaintiffs [*or, defendants*] above named, being duly sworn, says that he is acquainted with the facts stated in the foregoing complaint (*j*) [*or, answer*]; that the same is true to his own knowledge [except as to those matters therein stated on information and belief, and as to those matters he believes it to be true].

[Signature.]

[Jurat.]

165. *By two Parties not united in Interest, but Pleading together. (k)*

[Venue.]

A. B. and C. D., the plaintiffs [*or, the defendants*] above named, being severally duly sworn, say each for himself that the foregoing complaint (*l*) [*or, answer*] is true to his own knowledge [except as to those matters therein stated on information and belief, and as to those matters he believes it to be true].

[Jurat.]

[Signatures.]

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(*j*) Whether it is necessary for the deponent to state that he is acquainted with the facts, has not been decided in any reported case. It is the safer practice to state it.

(*k*) Parties pleading together must all join in the verification, unless they are united in interest. *Andrews v. Storms*, 5 *Sandf.*, 609; *Youngs v. Seeley*, 12 *How. Pr.*, 395.

In an action against husband and wife where her interest is separate,—

*e. g.*, an action to set aside a conveyance to her as void against creditors,—the answer must be verified by both, if relied on as the answer of both. *Youngs v. Seeley*, 12 *How. Pr.*, 395, *Reed v. Butler*, 2 *Hilt.*, 589.

(*l*) The verification of a complaint, like that of an answer, should be united in by every party who unites in the pleading, and whose interest is several. *Gray v. Kendall*, 5 *Bosw.*, 666; *S. C.*, 10 *Abbotts' Pr.*, 66.

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 Verification by Agent.
 

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## III. BY AGENT OR ATTORNEY.

166. *By Attorney, when the Party is not within the County. (m)*[ *Venue.* ]

A. B., being duly sworn, says that he is the attorney [*or, one of the attorneys*] of the plaintiff in this action; that the foregoing complaint is true to his own knowledge [*except as to those matters therein stated on information and belief, and as to those matters he believes it to be true*]. Deponent further says, (*n*) that the reason the verification is not made by said plaintiff is that he is not within the county of \_\_\_\_\_, which is the county where deponent resides;\* and that this deponent's knowledge is derived from the possession of the notes in suit, and from the admissions of the defendant to this deponent [*or, other sources of personal knowledge, if any. Where a portion or all the material allegations are on information and belief, add or substitute the following clauses:* That the grounds of his belief are information received from the letters of the plaintiff, *or, from M. N. of \_\_\_\_\_, the agent of the plaintiff, (o) or, other sources of information*].

[ *Signature.* ][ *Jurat.* ]

(*m*) When the party is not within the county where the attorney resides, a verification made by the attorney is good, though the action be not on a written instrument for the payment of money only, and in his possession, and he has no personal knowledge of the truth of the allegations of the pleading. *Lefever v. Latson*, 5 *Sandf.*, 650; *Roscoe v. Maison*, 7 *How. Pr.*, 421; *Stannard v. Mattice*, *Id.*, 4; *Smith v. Rosenthall*, 11 *Id.*, 442; *Wilkin v. Gilman*, 13 *Id.*, 225; *People v. Allen*, 14 *Id.*, 334; *Drevert v. Apsert*, 2 *Abbotts' Pr.*, 165; *Myers v. Gerrits*, 13 *Id.*, 106; *Gourney v. Wersoland*, 3 *Duer*, 613; *Dixwell v. Wordsworth*, 2 *Code R.*, 1.

(*n*) In all cases where a verification is necessary, in order to dispense with a verification by the party, the person who makes the affidavit, stating that

the facts set forth in the pleadings are true of his own knowledge, must state what knowledge he has on the subject; and when he states that he believes the facts alleged on information and belief to be true, he must state the grounds upon which his belief is founded; and in addition to this, he must state why he makes the affidavit, and not the party. *Stannard v. Mattice*, 7 *How. Pr.*, 4; *Treadwell v. Fassett*, 10 *Id.*, 184; *Hubbard v. National Protection Ins. Co.*, 11 *Id.*, 149; *Meads v. Gleason*, 13 *Id.*, 309; *Boston Locomotive Works v. Wright*, 15 *Id.*, 253; *Fitch v. Bigelow*, 5 *Id.*, 237; *People v. Allen*, 14 *Id.*, 334; *Bank of Maine v. Buel*, *Id.*, 311; *Soutter v. Mather*, 14 *Abbotts' Pr.*, 440.

(*o*) An attorney may verify a pleading in behalf of his non-resident client.

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By Agent or Attorney.

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167. *The Same, where the Absent Defendant is a Corporation.*

[*Venue and Commencement.*]

That he is the attorney of the \_\_\_\_\_ Bank, plaintiffs in the above action; that the foregoing complaint is true to his own knowledge [except as to those matters therein stated on information and belief, and as to those matters he believes it to be true]. And he further says, that the said plaintiffs are a corporation, incorporated and transacting their business at \_\_\_\_\_, in the State of \_\_\_\_\_, and not established or transacting their business in the county in which deponent resides, neither do any of their officers reside in said county, but reside in said State of \_\_\_\_\_, which is the reason why this affidavit was not made by the plaintiffs. [*Continue as above, from the \*.*]

168. *By Agent or Attorney, when the Action or Defence is founded on a Written Instrument for the payment of Money only, which is in his Possession.*

[*Venue.*]

A. B., being duly sworn, says, that he is the agent of the plaintiff in this action, for the purpose of collecting the demand sued in the complaint [*or*, the general agent of the plaintiff in this city, (*p*) *or*, the attorney, *or*, one of the attorneys for the plaintiff in this action]; that the foregoing complaint [*or*, answer] is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says, that the reason why the verification is not made by the plaintiff [*or*, defendant]

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although it appears that the client has a resident agent, and that it is through him the attorney has obtained his information. *Drevert v. Apsert*, 2 *Abbotts' Pr.*, 165.

(*p*) It is held in *Boston Locomotive Works v. Wright* (15 *How. Pr.*, 253), that a verification by agent must disclose the nature of the deponent's agency. But it is not necessary that a pleading should be verified by the agent

who knows most about the matter. *Drevert v. Apsert*, 2 *Abbotts' Pr.*, 165. Stating that the notes sued on were in the possession of the deponent, and that the reason why the verification was not made by the plaintiff was his absence from the State, sufficiently avers that deponent was the agent of the plaintiff to put the defendant to proof of the contrary. *Myers v. Gerrits*, 13 *Id.*, 106.

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 Verification by Agent or Attorney.
 

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is that the action [*or, defence*] is founded upon a written instrument for the payment of money only, and such instrument is in the possession of deponent; and that his knowledge (*g*) is derived from said instrument, and also from the admissions of the plaintiff to this deponent [*or, also from having witnessed the execution and delivery of the same, or, other sources of personal knowledge, if any. Where a portion or all of the material allegations are on information and belief, add or substitute the following clause:* that the grounds of his belief are the statements of the plaintiff to this deponent, *or, other sources of information*].

[Signature.]

[Jurat.]

169. *The Same, where the Material Allegations are within his Personal Knowledge.*

[Venue.]

A. B., being duly sworn, says, that he is the agent [*or, attorney, or, one of, &c.*] for the plaintiff [*or, defendant*] in this action, that the foregoing complaint [*or, answer*] is true to his own knowledge, except as to those matters therein stated on information and belief, and as to those matters he believes it to be true. Deponent further says, that the reason why the verification is not made by the plaintiff [*or, defendant*], is that all the material allegations of said complaint [*or, answer*] are within the personal knowledge of this deponent; and that his knowledge is derived from the admissions of the defendant to this deponent [*or, other sources of personal knowledge*].

[Jurat.]

[Signature.]

(*g*) In an action upon an instrument for the payment of money only, the possession of the instrument is enough, under section 157 of the Code, to authorize an agent or attorney of the plaintiff to verify the complaint (*Myers v. Gerrits*, 13 *Abbotts' Pr.*, 106); whether the plaintiff be within the county or not. *Wheeler v. Chesley*, 14 *Abbotts' Pr.*, 441.

Stating his possession of the instru-

ment for the payment of money only, sued on, with information derived from the plaintiff, is sufficient. *Wheeler v. Chesley, supra.*

The verification need not set forth the knowledge or grounds of belief of such agent or attorney, if all the allegations of the pleading are made in a positive form, and none are expressed as made on information or belief. *Ross v. Longmuir*, 15 *Id.*, 326.



## CHAPTER IX.

## COMPLAINTS.

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## I. A PLAINTIFF SUING ON BEHALF OF HIMSELF AND OTHERS.

170. *By One Creditor Suing on Behalf of all Others.*

[*Name of court, &c.*]

A. B., plaintiff, against Y. Z., defendant.
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The plaintiff, complaining on behalf of himself and all others (a) the creditors of M. N., who shall in due time come

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(a) In an action in which an injunction is sought, if all persons interested in the subject-matter are so numerous that it would be greatly inconvenient

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Creditor Suing in Behalf of Others.

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in and seek relief by, and contribute to the expenses of this action, alleges: [*set forth cause of action*].

That the said creditors of M. N. are very numerous, (b) to wit, more than                      in number, and that some of them are unknown to the plaintiff, and cannot with diligence be ascertained by him, and that it is impracticable therefore for him to bring them all before the court in this action; wherefore he sues for the benefit of all

171. *The Same, where only a Particular Class of Creditors are concerned.*

[*Title as above.*]

The plaintiff, complaining on behalf of himself and all others the creditors of M. N., who are parties to the deed of trust hereinafter mentioned, who shall come in due time and seek relief by, and contribute to the expenses of this action, alleges:

[*Continue as above; or add, unless it clearly appears by other allegations, That the question which is the subject of this action is one of a common and general interest of all the said creditors under said trust-deed, wherefore the plaintiff sues for the benefit of all.*] (c)

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to make them all parties, one of them may sue on behalf of all, but he must distinctly state in his complaint that he sues as well on behalf of himself as on behalf of all others equally interested with him *Smith v. Lockwood*, 1 *Code R.*, N. S., 319; S. C., 10 *N. Y. Leg. Obs.*, 12; *Wood v. Draper*, 24 *Barb.*, 187; S. C., 4 *Abbotts' Pr.*, 322. A complaint by one or more of a numerous class, may state that the plaintiffs sue for the benefit of those interested who may "come in and contribute to the expenses." Under the established practice, the words of the Code (§ 119)—"for the benefit of the whole,"—mean no more. *Dennis v. Kennedy*, 19 *Barb.*, 517.

(b) All the plaintiffs to an action should appear by name, unless they

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are so numerous that it is impracticable for them to do so. Thirty-five are not too numerous to join. *Kirk v. Young*, 2 *Abbotts' Pr.*, 453.

An action cannot be maintained for the benefit of an unincorporated society in the name of a member, merely upon an allegation that the members are extremely numerous; but the complaint must set forth the articles of association to enable the court to determine whether they have a right of action in the case, and whether the plaintiff named has authority to sue for them. A statement that he is especially authorized to do so, is not enough. *Habicht v. Pemberton*, 4 *Sandf.*, 657.

(c) See *Brooks v. Peck*, 38 *Barb.*, 519. Section 119 of the Code allows one or

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Complaints by Common Informers. By Assignees, &c.

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172. *By Common Informer. (d)*

A. B., the plaintiff, who sues as well for the People [or, for the overseers of the poor of the town of \_\_\_\_\_, in the county of \_\_\_\_\_], complains against Y. Z., and alleges:

## II. ASSIGNEES AND DEVISEES.

173. *Allegation of Assignment to Plaintiff. (e)*

I. [State cause of action accruing to the assignor.] (f)

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_ [or, thereafter, and before this action], (g) the said A. B. duly assigned the said claim [or, instrument] to the plaintiff. (h)

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more of several persons having a common or general interest, as distinguished from persons united in interest, to sue or defend for all, although they are not so numerous as to make it impracticable to join all. Thus, now, as heretofore, one of four separate legatees may sue on behalf of himself and the others, for an account, etc., and all may avail themselves of the decree. *McKenzie v. L'Amoureux*, 11 *Barb.*, 516.

(d) This form is from *Bullen & L. F.*, 17. Under a statute giving an action to certain persons, and in case they neglect to prosecute within a certain time, allowing any person to recover, a declaration in an action by one of the latter class must allege the neglect of the former to prosecute. *Morrell v. Fuller*, 7 *Johns.*, 402.

(e) That an allegation of the assignment is necessary, see *Prindle v. Caruthers*, 15 *N. Y.*, 426; *White v. Brown*, 14 *How. Pr.*, 282; *Adams v. Holley*, 12 *Id.*, 330. It is not enough merely to allege that "the said plaintiff is now the sole owner of the said demand." He must show how he acquired it. *Thomas v. Desmond*, 12 *How. Pr.*, 321; *Adams v. Holley*, *Id.*, 326; *Russell v. Clapp*, 7 *Barb.*, 482; *Bentley v. Jones*, 4 *How.*

*Pr.*, 202; *McMurray v. Gifford*, 5 *Id.*, 14; *Parker v. Totten*, 10 *Id.*, 233.

(f) In an action brought by an assignee of a corporation, as well as where the corporation is plaintiff, upon an agreement with the corporation, no specific allegation of the incorporation is necessary in the complaint; a statement of the name of the corporation, and of the making of the agreement between them, and of what the corporation did in fulfilment of the agreement, includes the idea of the legal existence of the company; and the fact of incorporation is not essential to be particularly stated in the pleading. *Kennedy v. Cotton*, 28 *Barb.*, 59.

(g) One who sues as assignee cannot maintain his title by proof of an assignment made after suit brought. *Garrigue v. Loescher*, 3 *Bosw.*, 578. But the time is sufficiently averred in this way. *Martin v. Kanouse*, 2 *Abbotts' Pr.*, 330.

(h) At common law, a sealed contract could be assigned by parol, and a statute which makes a deed necessary to such a transfer, does not change the rule of pleading. The fact which it is necessary to state, is the change of interest, and it is sufficient to aver that the contract was duly assigned. *Hor*

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 Allegations of Plaintiff's Title.
 

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174. *The Same, where Plaintiff is Trustee. (i)*

The plaintiff complaining as assignee for the benefit of the creditors of A. B., alleges :

I. [*State cause of action accruing to the assignor.*]

II. That on the                      day of                      , 18                      [or, thereafter, and before this action], the said A. B. duly assigned all his property, including the said claim, to the plaintiff, in trust, for the purpose of paying all his debts. (*j*)

175. *Where the Plaintiff or Defendant is a Devisee.*

That the said A. B., being seized of the estate hereinbefore mentioned, died on or about the                      day of                      , at                      ; and by his last will devised the same to this plaintiff [*or, to the defendant*]. (*k*)

ner v. Wood, 15 *Barb.*, 371. Such an averment imports that the assignment was by a sealed instrument, from which a consideration is to be inferred. Fowler v. N. Y. Indemnity Ins. Co., 23 *Barb.*, 143. A consideration need not be stated. Clark v. Downing, 1 *E. D. Smith*, 406; Burtnett v. Gwynne, 2 *Abbotts' Pr.*, 79; Vogel v. Badcock, 1 *Id.*, 176; Martin v. Kanouse, 2 *Id.*, 330.

(*i*) One coming into Chancery and claiming a right as a substituted trustee, under a will, should state all the material facts distinctly, in his bill, to show that such a vacancy had occurred as to authorize his appointment. If the will provides two modes for the appointment of new trustees, he must state in which mode he was appointed. Cruger v. Halliday, 11 *Paige*, 314.

(*j*) An assignee for the benefit of creditors is a trustee, and is not personally liable for costs. But he must allege in his complaint that he sues as such, or the court will not relieve him, in case he fails in the action. Murray v. Hendrickson, 6 *Abbotts' Pr.*, 96; S. C.,

1 *Bosw.*, 635. For any other purpose this allegation is unnecessary. For an assignee under a general assignment for the benefit of creditors, is to be deemed in law the holder and owner of things in action assigned to him, so as to entitle him to sue in his own name. He is an assignee of an express trust; has the entire legal title, and may sue in his own name without referring to his character as assignee. Butterfield v. Macomber, 22 *How. Pr.*, 150. It is irregular to allege that the demand is the property of the assignor, and that he is the lawful owner and holder thereof, or that the defendant is indebted thereon to the assignor. Palmer v. Smedley, 28 *Barb.*, 468; S. C., 6 *Abbotts' Pr.*, 205. Compare Myers v. Machado, *Id.*, 198; S. C., 14 *How. Pr.*, 149.

(*k*) This form of allegation is sufficient on demurrer. Spier v. Robinson, 9 *How. Pr.*, 325. But where the plaintiff is the devisee it may be well to refer more explicitly to the will, stating its date and the record.

## Commencement of Complaints by Associations.

## III. ASSOCIATIONS.

176. *By Officer of Joint-stock Company.* (l)

[Name of court, &amp;c.]

A. B., President [or, Treasurer],	}
of the                      Company,	
plaintiff,	
against	
C. D. and E. F., defendants.	

The plaintiff complaining as president [or, treasurer] of the Company, alleges:

I. That said company is a joint-stock company [or, association] in the town of                      , and county of                      , in this State, consisting of seven or more shareholders.

II. That the plaintiff is the president [or, treasurer] of said company [or, association]. (m)

(l) "Any joint-stock company or association consisting of seven or more shareholders or associates, may sue and be sued in the name of the president or treasurer for the time being of such joint-stock company or association." *Laws of 1849*, 389, ch. 258, § 1. This act does not include corporations. *N. Y. Marbled Iron Works v. Smith*, 4 *Duer*, 362.

By the act of 1851, 838, ch. 455, this act was extended to any company or association, composed of not less than seven persons, who are owners of or have an interest in any property, right of action, or demand, jointly or in common, or who may be liable to any action on account of such ownership or interest.

Such an action against a company by its officer has the same force and effect *so far as the joint property, &c., is concerned* as if it were against the members; but it does not bind their personal property, nor is it a bar to an action against them to enforce their personal liability upon the same debt.

(m) This averment is a material and issuable allegation. *Tiffany v. Williams*, 10 *Abbotts' Pr.*, 204. The complaint need not show that the association was formed for business purposes; and if it avers that the association consists of seven associates and upwards, it need not state their names. *Tibbets v. Blood*, 21 *Barb.*, 650.

## By Associations. By Banks.

177. *By Association of Joint-tenants or Tenants in Common.* (n)

I. That the property hereinafter mentioned is owned jointly [or, in common] by the \_\_\_\_\_ Company [or, Association], an association consisting of not less than seven persons.

II. [*As in the preceding form.*]

## IV. BANKS.

178. *Banking Association, Suing or Sued in its Associate Name.* (o)

[*Name of court, &c.*]

The A. B. Bank, plaintiff,	}
against	
W. X. and Y. Z., defendants.	

The plaintiffs complaining of the defendants, allege:

I. That the plaintiffs [or, defendants] are a Banking Association created by and under the laws of this State, organized pursuant to an act of the Legislature, entitled "An Act to authorize the Business of Banking," passed April 18, 1838, and the acts amending the same.

(n) For another form of complaint in an action brought under the act of 1851, by the officer of any association of seven or more persons who own any property jointly or in common, see FORMS OF COMPLAINTS ON PROMISSORY NOTES.

(o) The general law under which banking associations are organized, provides that suits may be brought by and against their president. Even since the amendatory act of March, 1841, this has been held to be permissive merely; and the better practice to be, to plead as a corporation. *Gillet v. Moody*,

3 *N. Y. (3 Comst.)*, 479; *Case v. Mechanics' Banking Association*, 1 *Sandf.*, 693; and see *Delafield v. Kinney*, 24 *Wend.*, 345; *Ogdensburg Bank v. Van Rensselaer*, 6 *Hill*, 240; and *East River Bank v. Judah*, 10 *How. Pr.*, 135.

And this is now the common practice,—*e. g.*, *Bank Commissioners v. St. Lawrence Bank*, 7 *N. Y. (3 Seld.)*, 513; *Commercial Bank of Pennsylvania v. Union Bank*, 11 *N. Y. (1 Kern.)*, 203; *Bank of Genesee v. Patchin Bank*, 13 *N. Y. (3 Kern.)*, 309; *Mechanics' Banking Association v. Place* 4 *Duer*, 212.





## By Corporations.

ignation of the Bank of \_\_\_\_\_, pursuant to authority of an act of the Legislature, entitled "An Act to authorize the Business of Banking," passed April 18, 1838, and the acts amending the same.

## V. CORPORATIONS. (s)

181. *By or Against (t) a Foreign Corporation.*

[*Title of the cause, and Commencement.*]

I. That the plaintiffs [*or*, defendants] are a corporation, duly chartered under and by the laws of the State of \_\_\_\_\_, and

6 *N. Y.* (2 *Seld.*), 168; *Pentz v. Sackett, Hill & D. Supp.*, 113; *Ogdensburgh Bank v. Van Rensselaer*, 6 *Hill*, 240. Compare *Hunt v. Van Alstyne*, 25 *Wend.*, 605. But even then the action is deemed to be by the bank, not by the president in right of the bank. *Lowerre v. Vail*, 5 *Abbotts' Pr.*, 229; *Root v. Price*, 22 *How. Pr.*, 372.

(*r*) In an action by an individual banker doing business under the general law, it is the proper practice for him to sue in his individual name, and not as the president of his bank. *Bank of Havana v. Magee*, 20 *N. Y.*, 355; *Hallett v. Harrower*, 33 *Barb.*, 537.

The nominal proprietor of an individual bank, who furnishes the securities to the comptroller, and to whom the circulating notes of the bank are delivered by that officer, and in whose name, as proprietor, all the contracts and transactions of the bank are made and conducted, is a "trustee of an express trust," and may sue in his own name. *Burbank v. Beach*, 15 *Id.*, 326.

(*s*) Before the Code, it was well settled that a corporation plaintiff need not aver its corporate existence in its declaration; but that it was sufficient to show that fact by replication if denied by the plea. *Henriques v. Dutch West India Co.*, 2 *Ld. Raym.*, 1535; 3 *Harr.*, 105, 158; 4 *Blackf.*, 267; 5 *Id.*, 146; *Morris v. Stops*, *Hob.*, 211; *U. S.*

*Bank v. Haskins*, 1 *Johns. Cas.*, 132; *Dutchess Cotton Manufactory v. Davis*, 14 *Johns.*, 238; *Bank of Utica v. Smalley*, 2 *Cow.*, 770; *Bank of Auburn v. Weed*, 19 *Johns.*, 300; *Bank of Michigan v. Williams*, 5 *Wend.*, 478; *Proprietors of Southold v. Horton*, 6 *Hill*, 501; *Marine & Fire Ins. Bank v. Jauncey*, 1 *Barb.*, 486; *Camden & Amboy R. R. Co. v. Remer*, 4 *Id.*, 127; *Bank of Genesee v. Patchin Bank*, 13 *N. Y.* (3 *Kern.*), 309; *Union Mutual Ins. Co. v. Osgood*, 1 *Duer*, 707; *Metropolitan Bank v. Lord*, 4 *Duer*, 630; *S. C.*, 1 *Abbotts' Pr.*, 185; *Bank of Waterville v. Beltser*, 13 *How. Pr.*, 270; *Kennedy v. Cotton*, 28 *Barb.*, 59; *La Fayette Ins. Co. v. Rogers*, 30 *Id.*, 491; *Shoe & Leather Bank v. Brown*, 9 *Abbotts' Pr.*, 218; *S. C.*, 18 *How. Pr.*, 308. On the same principle a complaint against a domestic corporation need not allege its incorporation. *Lighte v. Everett Fire Ins. Co.*, 5 *Bosw.*, 716; *Acome v. American Mineral Co.*, 11 *How. Pr.*, 24.

This rule, however, is held not to apply to foreign corporations plaintiff. They must at least indicate the authority by which they were incorporated. *Connecticut Bank v. Smith*, 9 *Abbotts' Pr.*, 168; *Waterville Manufacturing Co. v. Bryan*, 14 *Barb.*, 182. This is not, however, necessary where they are sued on a contract with them

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 Commencement of Complaints by or against Corporations.
 

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pursuant to an act of the Legislature of said State, entitled [*title of the act*], passed [*date of the enactment*]. (u)

II. That said corporation, being entitled, by its charter and the laws of said State, to make the contract hereinafter mentioned [*allege cause of action*]. (v)

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in their corporate name. 18 *Ind.*, 237. Compare 11 *Iowa*, 502

Where defendants are alleged to be a corporation doing business within this State, the court will not intend, as a matter of law, that it is a foreign corporation. *Acome v. American Mineral Co.*, 11 *How. Pr.*, 24.

The Revised Statutes provide that "in suits brought by a corporation created by or under any statute of this State, it shall not be necessary to prove on the trial of the cause, the existence of such corporation, unless the defendant shall have pleaded in abatement or in bar, that the plaintiffs are not a corporation." 2 *Rev. Stat.*, 458, § 3. Corporations are sometimes created *ipso facto, et eo instanti*, by the mere passage of a statute; but more frequently the statute declares and points out the mode in which the legal body may thereafter be brought into existence. It is to corporations of the latter class, and to actions in which the plea of *null tiel* corporation may be pleaded, that the foregoing statute applies; but it is wholly inapplicable where the claim to corporate character rests on a statute which, as matter of law, confers no such character. *Proprietors of Southold v. Horton*, 6 *Hill*, 501. Under the Code, the averment is still unnecessary in the complaint. *Bank of Waterville v. Beltser*, 13 *How. Pr.*, 270.

The trustees of a corporation should sue in the corporate name only. *Bundy v. Birdsall*, 29 *Barb.*, 31.

An officer of a foreign corporation or company may maintain an action here in his own name on behalf of his company, if his complaint states facts showing his authority to sue on their be-

half; for in such case he may be regarded as the trustee of an express trust. But merely alleging that he is authorized, is not enough. *Myers v. Machado*, 6 *Abbotts' Pr.*, 198.

Where members of a corporation bring an action on behalf of the corporation, the complaint must allege that the officers whose duty it is to sue, have been requested to institute proceedings for that purpose, and have refused to do so. *Vanderbilt v. Garrison*, 3 *Id.*, 361; *House v. Cooper*, 16 *How. Pr.*, 292.

At common law, though a receiver has been appointed, and all the assets assigned to him, if the corporation is still in being, a suit may as well be maintained in the name of the corporation as in that of the receiver. *Bank of Lyons v. Demmon*, *Hill & D. Supp.*, 398.

Where a common-law receiver sues in the name of the corporation, the declaration must aver that the suit is brought by the direction of the receiver. *Bank of Niagara v. Johnson*, 8 *Wend.*, 645.

The officers of a corporation are not proper parties-defendant to an action against it to recover a mere money-demand, except where statute authorizes suits to be against them. *Brahe v. Pythagoras Association*, 4 *Duer*, 658.

(t) One foreign corporation may sue another in the courts of this State upon a cause of action arising in it. *Bank of Commerce v. Rutland & Washington R. R. Co.*, 10 *How. Pr.*, 1. But a complaint against a foreign corporation must either allege that the plaintiffs are residents of this State, or that the cause of action arose, or the subject of action is situated, within this State;

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By or against Corporations.

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182. *Domestic (w) Corporation, formed under the General Manufacturing Companies' Act.*

I. That the defendants are a corporation created by and under the laws of this State, organized pursuant to an act of the Legislature, entitled "An Act to authorize the Formation of Corporations for Manufacturing, Mining, Mechanical, and Chemical Purposes," passed February 17, 1848, and the acts amending the same. (x)

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and if it does not, it may be dismissed on motion. *House v. Cooper*, 16 *Id.*, 292.

(u) This form is supported by *Mutual Benefit Life Ins. Co. v. Davis*, 12 *N. Y. (2 Kern.)*, 569; *N. Y. Floating Derrick Co. v. N. J. Oil Co.*, 3 *Duer*, 648; and *Elizabethport Manufacturing Co. v. Campbell*, 13 *Abbotts' Pr.*, 86. Where no allegation like the above is inserted, an answer denying specifically the allegations of the complaint, though it does not deny, yet it does not admit the incorporation, and the plaintiff must prove it by evidence of the charter or general act, organization, and user. *Waterville Manufacturing Co. v. Bryan*, 14 *Barb.*, 182; and see *Stoddard v. Onondaga Annual Conference*, 12 *Id.*, 573.

(v) It is not necessary to set forth the specific power of the corporation under which the transaction in question arose. *Reformed Dutch Church v. Vedder*, 4 *Wend.*, 494; *Struver v. Ocean Ins. Co.*, 2 *Hilt.*, 475; *S. C.*, more fully reported, 9 *Abbotts' Pr.*, 23; *Perkins v. Church*, 31 *Barb.*, 84; *Marine & Fire Ins. Bank v. Jauncey*, 1 *Id.*, 486. Compare, however, *Camden & Amboy R. R. & Transportation Co. v. Remer*, 4 *Id.*, 127. Where the reason of the rule is questioned. And the contrary was held in *Bard v. Chamberlain*, 3 *Sandf. Ch.*, 31; where it is said that the power of a foreign corporation to make the contract which is

sought to be enforced, must be set forth in the bill; and that an allegation that it was incorporated with various powers and duties, will not let in proof of a power to loan money and take security on land; and that setting forth a statute enacted after the transaction in question, is not enough.

(w) Facts extrinsic to the cause of action, and only necessary to give jurisdiction to the local court in which the action is brought, need not be alleged. Thus, in an action brought in the local courts of cities, mentioned in section 33 of the Code of Procedure, against domestic corporations, transacting their general business, or keeping an office within such cities respectively, of which actions, subdivision 3 of that section gives those courts jurisdiction, it is not necessary for the complaint to show that the defendants transact their general business, or keep an office within the city. *Corn Exchange Bank v. Western Transportation Co.*, 15 *Abbotts' Pr.*, 319, *note*; *Koenig v. Nott*, 2 *Hilt.*, 323; *S. C.*, 8 *Abbotts' Pr.*, 384.

(x) This form of averment is supported by *N. Y. Floating Derrick Co. v. N. J. Oil Co.*, 3 *Duer*, 648; *Oswego & Syracuse Plank-road Co. v. Rust*, 5 *How. Pr.*, 390.

As to the necessity of this allegation where a domestic corporation is the plaintiff, see *note (s), supra*.

In actions by or against a corporation

## Complaints by or against Corporations.

II. [*Allege cause of action.*] (y)183. *The Same, formed under the Plank-road and Turnpike Companies' Act.*

I. That the defendants are a corporation created by and under the laws of this State, organized pursuant to an act of the Legislature entitled "An Act to provide for the Incorporation of Companies to construct Plank-roads, and of Companies to

created under a law of this State, it is not necessary to recite the act or proceedings of incorporation, or to set forth the substance thereof; but the same may be pleaded by reciting the title of such act, and the date of its passage. 2 *Rev. Stat.*, 459, § 13; and see *U. S. Bank v. Haskins*, 1 *Johns. Cas.*, 132. (See, also, section 163 of the Code, which authorizes this mode of pleading statutes.) But the short mode of pleading permitted by this statute is not intended to relieve corporations from proving their existence. *Onondaga County Bank v. Carr*, 17 *Wend.*, 443. Compare *Bank of Waterville v. Beltser*, 13 *How. Pr.*, 270; *Bank of Genesee v. Patchin Bank*, 13 *N. Y. (3 Kern.)*, 309.

Where the original act of plaintiff's incorporation is referred to in the complaint, a vague reference to other general statutes affecting it does not render the complaint demurrable. *Sun Mutual Ins. Co. v. Dwight*, 1 *Hill.*, 50.

Before the Code it was held that where a corporation undertook to plead its existence by setting forth the title of the act, it must do so with accuracy; and a replication describing the act as "An act incorporating the president, directors, and company of," &c., whereas its true title was "An act to incorporate the stockholders of," &c., was held bad on demurrer. *Union Bank v. Dewey*, 1 *Sandf.*, 509. But a plea set-

ting forth that A. and others, his associates, were created and declared a body corporate, &c., by the name of, &c., without alleging organization, was held sufficient in *Beekman v. Traver*, 20 *Wend.*, 67.

(y) Though an obligation given to a corporation, which is in terms payable to its agents or directors, should properly be described, in declaring on it, as given to the corporation, by the name and description of the directors, &c., the omission of such averment is cured by verdict, or judgment by default. *Bayley v. Onondaga County Mutual Ins. Co.*, 6 *Hill*, 476.

Where a deed is made to a corporation, by a name varying from the true name, they may sue in their true name, and aver in the declaration, that the defendant made the deed to them, by the name mentioned in the deed; and an allegation that the defendants acknowledged themselves to be bound unto the plaintiffs, by the description of, &c., is equivalent to such an averment. *N. Y. African Society v. Varick*, 13 *Johns.*, 38.

A contract not under seal, signed by agents of a corporation, and showing upon its face that the agents intended to contract for the corporation, and not for themselves, may be declared upon as its contract. Reformation in equity is not necessary. *Many v. Beekman Iron Co.*, 9 *Paige*, 188.

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 Against Municipal Corporations.
 

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construct Turnpike-roads," passed May 7, 1847, and the acts amending the same. (z)

184. *Against the Corporation of the City of New York.* (a)

[*Title of the cause.*]

The plaintiff complaining of the defendant, a municipal corporation created by the laws of this State, alleges :

I. [*Set forth cause of action.*]

II. And this plaintiff further shows that heretofore, and on or about the                      day of                      , he presented in writing to the comptroller of the city of New York the claim hereinbefore set forth, upon which this action is founded, for adjustment, and that at least twenty days have elapsed since such presentation of the claim.

III. And this plaintiff further shows that heretofore, and on or about the                      day of                      , and after the expiration of the said twenty days, he made a second demand, in writing, upon the said comptroller, for the adjustment of the said claim, but the said comptroller has hitherto wholly neglected and refused to make an adjustment or payment thereof. (b)

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(z) This form of averment is supported by *Oswego & Syracuse Plank-road Co. v. Rust*, 5 *How. Pr.*, 390 ; *N. Y. Floating Derrick Co. v. N. J. Oil Co.*, 3 *Duer*, 648.

(a) No action can be maintained against the mayor, &c., of the city of New York, unless it appears, by an allegation in the complaint, that at least twenty days have elapsed since the claims upon which the action is founded were presented to the comptroller of said city for adjustment ; and not then, unless it further appears, by

an additional allegation, that the comptroller, upon a second demand, in writing, made after the expiration of said twenty days, neglected to make an adjustment or payment thereof. *Laws of 1860*, 645, ch. 379, § 2.

For somewhat similar statutes as to the necessary demand before a suit against the cities of Brooklyn and Buffalo respectively, see *ante*, p. 10. *note (a)*.

(b) This form is from *Carman v Mayor, &c., of N. Y.*, 14 *Abbotts' Pr* 301.

## Complaints by or against Personal Representatives.

## VI. EXECUTORS AND ADMINISTRATORS.

185. *Plaintiff's Appointment as Administrator.*

[Name of court, &amp;c.]

A. B., as administrator,<sup>(c)</sup> &c., of the  
estate of M. N. deceased, plaintiff,  
against  
W. X. and Y. Z., defendants.

The plaintiff complaining as administrator as aforesaid alleges:  
[here set forth cause of action, if it accrued before plaintiff's

(c) A complaint commencing A. B., administrator of the goods, &c., of — deceased, plaintiff in this action, and containing no other statement of the fact of the plaintiff's appointment as administrator, does not allege that he is administrator or show that he prosecutes in that capacity. The introductory statement is merely a *description of the person*. In an action required to be brought by the administrator, in his capacity as such, a complaint so drawn does not contain a statement of facts constituting a cause of action, and is bad on demurrer. So of the complaint of an executor. *Merritt v. Seaman*, 6 *N. Y.* (2 *Seld.*), 168; *Sheldon v. Hoy*, 11 *How. Pr.*, 11; *Christopher v. Stockholm*, 5 *Wend.*, 36; *Worden v. Worthington*, 2 *Barb.*, 368.

A complaint which describes plaintiff as an executor, and states the cause of action—*e. g.*, money received—as an indebtedness due to the plaintiff as executor, and that the money was had and received by the defendant for the use of the plaintiff as such executor, sufficiently shows that the plaintiff sues in his representative character. *Scranton v. Farmers & Mechanics' Bank*, 33 *Barb.*, 527.

The fact that the plaintiff is admin-

istrator, and has been regularly appointed by the surrogate of some county in this State, is a material and traversable fact, and must be stated in such form as to tender an issue to the other party. Matter merely descriptive of the person of the plaintiff is not issuable, nor does it constitute any part of the cause of action. *Sheldon v. Hoy*, 11 *How. Pr.*, 11. The date, place, and power of appointment must be averred, issuably. *Neil v. Cherry*, 1 *West. Law M.*, 155. If this is not done in an action which the plaintiff must necessarily bring in his representative capacity, the complaint is bad on demurrer on that ground. *Sheldon v. Hoy*, 11 *How. Pr.*, 11. Otherwise, if the cause of action is one on which he may sue in his own right. *Bright v. Currie*, 5 *Sandf.*, 433; *S. C.*, 10 *N. Y. Leg. Obs.*, 104.

As to when an action by an executor should be brought in the representative, and when in the individual capacity, see *Lyon v. Marshall*, 11 *Barb.*, 241; *Merritt v. Seaman*, 6 *N. Y.* (2 *Seld.*), 168; *Mowry v. Adams*, 14 *Mass.*, 327; *Talmadge v. Capel*, 16 *Id.*, 73; *Biddle v. Wilkins*, 1 *Pet.*, 692; *Curtis v. Dutton*, 4 *Sandf.*, 719; *Wiltzie v. Beardsley*, *Hill & D. Supp.*, 386.

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 By or against Personal Representatives.
 

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*appointment; if subsequent, set it forth after the next paragraph].*

That thereafter and before this action [*or*, on the day of                      , 18    ], said A. B. died intestate, (*d*) and that on the                      day of                      18    , letters of administration upon the estate of said A. B., deceased, were duly issued and granted (*e*) to this plaintiff by the surrogate of the county of                      , of this State, (*f*) appointing this plaintiff administrator of all the goods, chattels, and credits which were of said deceased, and that this plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of his said office. (*g*)

### 186. *Defendant's Appointment as Administrator.*

[*Title and Commencement, as in preceding form; and next state the Cause of Action, if it accrued against the decedent.*]

II. That thereafter [*or*, on the                      day of                      , 18    ], said M. N. died intestate.

III. That on the                      day of                      , at                      , an order or determination of the surrogate of the county of                      , was duly made, appointing the defendant administrator of the goods, chattels, and credits of said M. N., and that he is now such administrator.

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(*d*) It was held in *Ketchum v. Morrell*, 2 *N. Y. Leg. Obs.*, 58, that in a suit by the public administrator, the declaration must aver distinctly the decedent's intestacy; and the allegation is equally proper in other cases.

(*e*) This is the proper form of alleging the appointment of an executor or administrator. *Beach v. King*, 17 *Wend.*, 197; *Gillet v. Fairchild*, 4 *Den.*, 80.

(*f*) Section 161 of the Code, is applicable to the decision of the surrogate in the appointment of an executor or administrator. *Wheeler v. Dakin*, 12 *How. Pr.*, 537.

It was held in *Ketchum v. Morrell*, 2 *N. Y. Leg. Obs.*, 58, that where letters

of administration had been granted to a previous administrator, the profert should set forth that fact, and that such letters had been revoked.

But the former rules of profert and oyer have no application under the Code. *Mayor of N. Y. v. Doody*, 4 *Abbotts' Pr.*, 127; and see *Welles v. Webster*, 9 *How. Pr.*, 251.

(*g*) This form is supported by *Wheeler v. Dakin*, 12 *How. Pr.*, 537; *Welles v. Webster*, 9 *Id.*, 251. In those States where the right to sue the representative is dependent on the presentation of a demand, and his rejection of it, those facts must be averred. *Ellisson v. Halleck*, 6 *Cal.*, 386; *Heulsch v. Porter*, 10 *Id.*, 555.

## Complaints by Executors.

187. *Plaintiff's Appointment as Executor. (h)*

[*Title and Commencement, as in preceding forms; and next set forth the Cause of Action, if it accrued to the decedent.*]

II. That thereafter, and before this action [or, on the day of                      , 18     ], said M. N. died, leaving a will, (*i*) by which this plaintiff was appointed the sole executor thereof [or, this plaintiff and C. D. were appointed executors thereof].

III. That on the                      day of                      , 18     , said will was duly proved and admitted to probate in the office of the surrogate of the county of                      , and letters testamentary thereupon were thereafter duly issued and granted (*j*) to this plaintiff, as sole executor, by the surrogate of said county; and this plaintiff thereupon duly qualified as such executor, and entered upon the discharge of the duties of his said office. (*k*)

(*h*) An executor derives his authority from the will, and at the common law he might commence an action before probate. But under the statute (2 *Rev. Stat.*, 71, § 16),—which deprives executors of any power, except to pay funeral charges and preserve the estate, until letters testamentary are granted,—the issue of letters must generally be had before commencing suit, and must be alleged in the pleading. *Thomas v. Cameron*, 16 *Wend.*, 579.

Where an executor takes a mortgage in his individual name, adding merely a description of him as executor of, &c., and dies, a bill filed by his successor to foreclose the mortgage must expressly allege, aside from the language of the mortgage, that it was a part of the assets. *Peck v. Mallams*, 10 *N. Y. (6 Seld.)*, 509.

(*i*) Where the authority of executors is material, a distinct averment of their testator's death is proper. *Halleck v. Mixer*, 16 *Cal.*, 574. A bill alleging that there was an instrument in writing purporting to be the last will and testament of M., de-

ceased, and to be duly executed and attested; that it was admitted to probate as a will of real and personal estate, and that letters testamentary were issued, and the executors took upon themselves the execution of the instrument, sufficiently shows that the instrument was a will, and had been so adjudged by the Surrogate's Court. *Mason v. Jones*, 13 *Barb.*, 461; *Van Cortlandt v. Beekman*, 6 *Paige*, 492.

(*j*) Averring that the plaintiffs "have been duly appointed and qualified by the surrogate of the county of New York, to act as the sole executors of A. B., deceased," is not sufficient. *Forrest v. Mayor, &c., of N. Y.*, 13 *Abbotts' Pr.*, 350.

(*k*) The former rule was, that where there were several executors, all must join in the prosecution of a suit, even though some had renounced. *Bodle v. Hulse*, 5 *Wend.*, 313. But since the act of 1838 (*Laws of 1838*, 103, ch. 149, § 1), it is no longer necessary to join these executors, as parties to whom letters testamentary have not issued, and who have not qualified.



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By Executor, &c. Against Husband and Wife.

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188. *Defendant's Appointment as Executor, (l) or Administrator with the Will Annexed.*

[Commencement, &c., as in preceding forms.]

II. That thereafter, and before this action [or, on the day of \_\_\_\_\_], said M. N. died leaving a will [appointing the defendant his executor].

III. That the defendant, by an order or determination of the surrogate of the county of \_\_\_\_\_, duly made on the day of \_\_\_\_\_, was appointed, and now is, the executor of said will [or, the administrator of his estate with the will annexed].

189. *Commencement of Complaint by Executor or Administrator, where he may Sue in his own Right.*

The plaintiff above named, complaining as administrator of the estate [or, executor of the will] of M. N., deceased, alleges:

VII. HUSBAND AND WIFE.

190. *On a Debt of the Wife, contracted before Marriage, (m) where the Husband has acquired, by an Ante-nuptial Agreement, Separate Property of his Wife.*

I. That the defendant W. Z. is the wife of the defendant Y. Z. (n)

II. That previous to the marriage of the defendants, while said W. Z. was sole and unmarried [here set forth the cause of action against her].

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(l) In an action against several executors, such of them as are first served with process, or first appear, are entitled (under 2 Rev. Stat., 448, § 5) to answer for the estate; and it is irregular for their co-executor to put in an answer thereafter.

Nor does collusion between the plaintiff and the executor who first answers, give his co-executor the right to answer, at least not without the leave of the court, on a direct application for that purpose. *Salters v. Pruyn*, 15 *Abbotts' Pr.*, 224

(m) Under the *Laws of 1853*, 1057 ch. 576.

For a form of complaint against husband and wife, on a note indorsed by the wife while sole, before the delivery of the note to the payee, see *Sexton v. Fleet*, 6 *Abbotts' Pr.*, 8; S. C., 15 *How. Pr.*, 106.

(n) A marriage *de facto*, although not legally solemnized is sufficient, at common law, to render the husband liable for the previously contracted debts of the wife. *Andr.*, 227, 228; 1 *Campb.*, 245; 2 *Esp.*, 637.

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 Complaints against Husband and Wife.
 

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III. (o) The plaintiff further shows, that previous to the marriage of the defendants, said W. Z. owned certain property, to wit: [*here describe the property of the wife which the husband has acquired*].

IV. That before their marriage the defendants entered into an ante-nuptial agreement [*here state effect of agreement as to transfer of property*]; and that the value of the separate property of said defendant W. Z. [*wife*], so acquired by the defendant Y. Z. [*husband*], was                      dollars.

191. *The Same, where the Husband has acquired, after Marriage, that which was before Marriage the Property of his Wife.*

[I., II., and III., as in preceding form.]

IV. That since the marriage of the defendants, and \* before this action, the defendant W. Z. conveyed to the defendant Y. Z. [*here state what was conveyed*]; and that the value of the separate property of the defendant [*wife*], so acquired by the defendant [*husband*], was                      dollars.

192. *The Same, where the Husband has acquired that which became the Separate Property of his Wife after Marriage.*

[I. and II., as in Form 190.]

III. That since the marriage of the defendants, certain property, to wit [*here describe her separate property*], became the sole and separate property of the defendant [*wife*], by inheritance [*or, gift, grant, devise, or, bequest*] from [a person other than her said husband, to wit: one] M. N.

IV. That thereafter and [*continue as in the preceding form, from the \**].

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(o) If the husband has acquired none of the wife's separate property, these two paragraphs are not essential. In such case, the judgment, though against both, can be executed only against the wife's separate property. *Laws of 1853,*

1057, ch. 576. But the complaint is not demurrable for omitting to designate the wife's separate property, which by that statute is alone bound by the judgment in such case. *Foot v. Morris, 12 N. Y. Leg. Obs., 61.*

## Appointment of Guardian.

## VIII. INFANTS.

193. *By Infant Plaintiff, showing Appointment of Guardian ad litem.*

[*Name of court, &c.*]

<p>A. B., an infant, by C. D., his guardian, plaintiff,  against  Y. Z., defendant.</p>	}
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The plaintiff complaining of the defendant alleges :

I. That the plaintiff is an infant, under the age of twenty-one years.

II. That on the            day of           , 18   , at           , upon application duly made on his behalf, the said C. D. was, by an order of this court [*or*, by an order made by Hon.           , a judge of this court; *or*, by Hon.           , county-judge for            county], duly appointed the guardian of the plaintiff for the purposes of this action. (*p*)

194. *The Same, a Shorter Form.*

[*Commencement as above.*]

II. That on the            day of           , 18   , at           , the above-named           , was by Hon.           , a justice of this court [*or* county judge of            county], duly (*q*) appointed guardian of the plaintiff for the purposes of this action.

(*p*) The complaint of an infant by his guardian, must set forth the appointment of the guardian with certainty as to time, place, and power of the appointment. 2 *Saund.*, 117, *f.*, note 1; 1 *Lev.*, 224; 2 *Arch. Pr.*, 940; Stanley *v.* Chappel, 8 *Cow.*, 235; Hulbert *v.* Young, 13 *How. Pr.*, 413; and see Gillett *v.* Fairchild, 4 *Den.*, 83; Beach *v.* King, 17 *Wend.*, 197; and White *v.* Low, 7 *Barb.*, 204, as explained by White *v.* Joy, 13 *N. Y.* (3 *Kern.*), 82.

That the appointment was made upon the plaintiff's application, might be considered as sufficiently implied by

the averment that the guardian was duly appointed. See, as to the force of the word "duly" in pleading, Polly *v.* Saratoga & Washington R. R. Co., 9 *Barb.*, 449; People *ex rel.* Haws *v.* Walker, 2 *Abbotts' Pr.*, 421; People *ex rel.* Crane *v.* Ryder, 12 *N. Y.* (2 *Kern.*), 433. And objection to a complaint which merely states that he was duly appointed, cannot be taken by demurrer; but if too general, the remedy is by a motion to make it more definite. Seré *v.* Coit, 5 *Abbotts' Pr.*, 481.

(*q*) We consider the above form as authorized by the Code (§ 161), but the

## Complaint alleging Appointment of Committee.

## IX. LUNATICS, ETC.

195. *By Committee of a Lunatic, Idiot, or Habitual Drunkard.*

[Name of court, &amp;c.]

A. B., as committee (r) of M. N., a lunatic, [or, an idiot, or, an habitual drunkard], plaintiff,  against  W. X. and Y. Z., defendants.	}
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The plaintiff, complaining as the committee of M. N., a lunatic [or, an idiot, or, a person of unsound mind, or, an habitual drunkard], alleges:

I. That on the                      day of                      , 18    , upon proceedings duly instituted in the Supreme Court (s) of this State, in and for the county of                      [or, in the case of an habitual drunkard, it may be, duly instituted in the County Court of the county of                      ], by an inquisition then taken and returned, said M. N. was found to be a lunatic [or, otherwise, as above], and thereupon this plaintiff was, by an order of said court, duly made by said court, on the                      day of                      , 18    , at                      , appointed committee of said M. N.'s person and estate.

cases do not uniformly recognize its sufficiency.

(r) Prior to the act of 1845 (ch. 112), it was requisite that actions on behalf of a lunatic should be brought in the lunatic's name. *Petrie v. Shoemaker*, 24 *Wend.*, 85; *Lane v. Schermerhorn*, 1 *Hill*, 97; *McKillip v. McKillip*, 8 *Barb.*, 552. But where a lunatic is a necessary party to a bill filed by the committee, a bill "of A., committee, &c., of B.," was deemed merely the committee's bill. *Gorham v. Gorham*, 3 *Barb. Ch.*, 24.

Under the act of 1845, however, committees may sue in their own name "for any debt, claim, or demand transferred to them, or to the possession or control of which they are entitled as

such committee." It has been held that under the Code the committee is the trustee of an express trust, and therefore may sue in his own name without joining the lunatic; that this extends to actions for equitable as well as those for legal relief, in the class of cases specified. *Person v. Warren*, 14 *Barb.*, 488. See, also, *Davis v. Carpenter*, 12 *How. Pr.*, 287. The case of *McKillip v. McKillip* (8 *Barb.*, 552), where it was held that an equitable action affecting real property must be brought in the lunatic's name, was an action commenced before the Code.

(s) As to the history of the judicial custody of lunatics, see *Brown's Case*, 1 *Abbotts' Pr.*, 108; S. C., 4 *Duer* 613.

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Alleging Appointment of Committee.

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196. *The Same, Another Form.(t)*

[*Title and Commencement, as above.*]

I. That a petition of lunacy, issued out of the Supreme Court, against said [*lunatic*], on or about the 9th day of November, 1854, which was duly executed by commissioners therein named, in the county of Albany, where said [*lunatic*] then resided, and still resides, and thereby, on the 18th day of November, 1854, it was found, by a jury duly summoned, that said [*lunatic*] was of unsound mind and incapable of the management of his lands, tenements, goods, chattels, and property, and that he had been in the same state of lunacy for the space of two years and upwards then next preceding; whereupon, on finding said commission duly executed, with the return of the commissioners and jury thereon indorsed and signed, with the clerk of Albany county, this court, on the 16th day of December, 1854, confirmed said finding of the jury, and further ordered, that said [*committee*], of Albany, be, and he then and there was, appointed committee of the person and the estate of [*lunatic*]; and said [*committee*] filed with said clerk, on or about December 18, 1854, the requisite bond for the faithful performance of his trust, duly acknowledged and approved; and that said appointment remains in full force, whereby said [*committee*] is still committee as aforesaid.

II. And this plaintiff says [*setting forth the cause of action—e. g., a promissory note made by defendant and indorsed to the lunatic*].

III. This plaintiff further says, that he is informed and believes that said note has not been paid, nor any part thereof, either to said [*lunatic*], before the appointment of this plaintiff as committee, or to this plaintiff since said appointment; that by virtue of said orders of the Supreme Court, said sum of money became due and payable to this plaintiff, and is still due him, he being the owner thereof as aforesaid. Wherefore, &c.

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Alleging Appointment of Committee. Separate Estate.

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197. *Against the Committee of a Lunatic, &c.*

[*Name of court, &c.*]

<p style="text-align: center;">A. B., against Y. Z., as committee of M. N., a lunatic [<i>or, an idiot, or, habit-</i> <i>ual drunkard</i>].</p>	}	
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[*After usual commencement and statement of cause of action against the lunatic, add,*]

II. That afterwards [*or, on the*                      day of                      , 18    ,  
at                      ], the said Y. Z. was duly (*u*) adjudged by the  
court to be a lunatic [*or, otherwise, as above*].

III. That the defendant was then and there duly (*u*) ap-  
pointed by the said court committee of the [person and] estate  
of the said lunatic.

Wherefore, the plaintiff demands judgment for                      dol-  
lars, with interest from                      , to be paid out of the estate  
of the said M. N., in the hands of the defendant.

## X. MARRIED WOMEN.

198. *Marriage and Separate Estate of Plaintiff. (v)*

II. That on the                      day of                      , 18    , (*v*) the plain-  
tiff intermarried with one J. S., whose wife she now is.

(*u*) A complaint against a committee of an habitual drunkard is bad on demurrer, for not stating a cause of action, if it omits to allege or show by what court or authority the debtor was declared an habitual drunkard, and the custody of his person and estate awarded to the defendant. *Hall v. Taylor*, 8 *How. Pr.*, 428. But less particularity may be deemed necessary in alleging the official capacity of the adverse party

than in other cases, because it is a matter peculiarly within his own knowledge.

(*v*) A married woman may now sue and be sued respecting her separate property or her transactions in her separate business as if she were a feme sole. We do not consider it necessary for her complaint to show that the action concerns her separate property, unless it appears by the complaint that

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Married Woman's Separate Estate.

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III. That the consideration of the said note [*or*, of the said transfer, *or*, indorsement of said note to the plaintiff] was the payment by this plaintiff to the maker [*or*, indorser, *or*, assignor] thereof, of the sum of \_\_\_\_\_, which said sum was [*or*, the principal and interest of a certain sum which was], at and before the time of her marriage, owned by her [*or*, which was acquired by her, by her trade or services]; and thereafter was her sole and separate property, and \* so continued until the time of such payment; and that said note thereupon became and ever since has been her sole and separate property. (*x*)

[*Or*, III. That the consideration of the said note [*or*, of the said transfer, *or*, indorsement, of said note to the plaintiff] was the payment by the plaintiff to the maker [*or*, indorser, *or*, assignor] of the sum of \_\_\_\_\_ dollars, which said sum became [*or*, was the principal and interest of a certain sum which became] after her said marriage her sole and separate property by inheritance [*or*, gift, grant, devise, *or*, bequest] from [a person other than her said husband, to wit, one] M. N., and [*continue as above, from the \**].

[*Or*, III. That the consideration of [*&c.*, *as above*], which said sum was the proceeds of certain property, which was at and before [*&c.*, *as above*], [*or*, which said sum was the proceeds of certain property which became after [*&c.*, *as above*].

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she is a married woman, which usually need not be the case. If she sues as if she were a feme sole, and the answer pleads her coverture, the fact that the subject of the action was her separate estate or arose in her separate business might be proved under that issue. If, however, the answer contains a counterclaim to which she desires to reply, pleading coverture, her reply should also contain the averments of which the form is given above.

Compare, on the effect of the recent statutes, *Coster v. Isaacs*, 16 *Abbotts' Pr.*, 328, and *note*; *Baldwin v. Kim-*

*mel*, *Id.*, 353, and *notes*; *Aiken v. Davis*, 17 *Cal.*, 129.

(*w*) In many cases the date of the marriage will be necessary, to bring the case within the statutes.

(*x*) A general averment that the property is the separate property of the married woman, is not bad on demurrer. If defendant has a right to be informed of the facts constituting the goods her separate property, his remedy is by motion. *Spies v. Accessory Transit Co.*, 5 *Duer*, 662; and see *Lippman v. Petersburg*, 10 *Abbotts' Pr* 254.

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Alleging Married Woman's Separate Estate.

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199. *The Same, in an Action other than on a Contract for the Payment of Money only.*

II. [*State marriage, as in preceding form.*]

III. That the property hereinbefore mentioned was, at and before the time of her said marriage, owned by her, and ever since has been her sole and separate property.

[*Or, III. That the property hereinbefore mentioned was after her said marriage bought by her with the proceeds of certain property, which was at and before the time of her said marriage owned by her; and that ever since the same has been [as above].*

[*Or, III. That the property hereinbefore mentioned became, after her said marriage, her sole and separate property, by inheritance [or, gift, grant, devise, or, bequest] from M. N., and that ever since the same has been [as above].*

[*Or, III. That the property hereinbefore mentioned was after her said marriage acquired by her, by her trade or services entered into on her own and separate account, and ever since, &c.*

200. *Against a Married Woman, on her Contract.* (y)

I. That the defendant is the wife of one M. N.

II. That at the time of making the note hereinafter mentioned, the defendant was, and still is, seized in fee [*or otherwise*] in her own separate right of a farm in the town of \_\_\_\_\_, and county of \_\_\_\_\_, containing about \_\_\_\_\_ acres of land, of the value of \_\_\_\_\_ dollars. (z)

III. [*State cause of action; and either show that the transaction was in a separate business carried on by her within this State, or that the consideration was a direct benefit to the defendant's separate estate, or else add:*]

IV. That in consideration thereof, the defendant agreed to (v) charge her said estate with the amount of the said

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(y) This form is from the forms reported by the Commissioners of the Code, 16.

(z) The earlier cases hold that the complaint must show what the estate is, and what is its value. *Sexton v. Fleet*, 6 *Abbotts' Pr.*, 9; *S. C.*, 15 *How. Pr.*, 106;

*Cobine v. St. John*, 12 *How. Pr.*, 336; but compare *Bostic v. Love*, 18 *Cal.*, 69; and *ante*, note (g).

(v) If the consideration was not for the benefit of the wife or her estate, this allegation is necessary. *Yale v. Dederer*, 18 *N. Y.*, 281.



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By and against Partners.

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Wherefore the plaintiff demands judgment : (b)

1. That said note be a charge on said estate of defendant ;
2. That said estate be applied to the payment of the sum of  
dollars, with interest from the       day of       , 18   .
3. That a receiver be appointed to take possession of the  
same, for that purpose.

200a. *Another form. Where contract sued on expresses intent  
to charge separate estate. (c)*

[*After alleging cause of action, add :*]

That the defendant is the wife of M. N., and at the time of making said indorsement she had and still has a separate estate, and intended to charge such separate estate by said indorsement.

Wherefore [*demanding usual money judgment.*]

## XI. PARTNERS.

201. *Commencement of Complaint by or against Partners.*

[*Name of court, &c., and title of cause, giving individual, not  
firm, names of plaintiffs and defendants.*]

The plaintiffs A. B. and C. D., partners, doing business under the firm-name of A. B. & Co., complain of W. X. and Y. Z., partners, doing business under the firm-name of X. & Z., and allege : (d)

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In an action to charge the separate estate of a married woman upon her promise, it is held necessary that the complaint should directly allege either that the consideration of the promise was for the benefit of the estate, or that she intended to charge such estate. Thus an averment that the consideration was a pair of horses, and that she kept a livery stable, is insufficient. *Palin v. Lent*, 5 *Bosw.*, 713. See, also, *Francis v. Ross*, 17 *How. Pr.*, 561.

(b) See *Cokine v. St. John*, 12 *How.*

*Pr.*, 339; *Yale v. Dederer*, 21 *Barb.*, 292; 31 *Id.*, 525; 18 *N. Y.*, 265; 22 *Id.*, 450.

(c) This form is sustained by *Corn Exch. Ins. Co. v. Babcock*, 8 *Abb. R.*, *N. S.*, 469, note.

(d) An averment of partnership is not essential where a joint interest will maintain the action, but where the contract sued on is in writing, and runs in the firm-name, it may be stated to identify the parties; and in many cases where the partnership is a material fact it should be alleged directly, as in the following form.

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 Allegations of Partnership. Office.
 

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202. *Another Form, Alleging Partnership.*[*Title as above.*]

The plaintiffs, complaining of the defendants, allege:

I. That at the times hereinafter mentioned, the plaintiffs [*or, defendants*] A. B. and C. D. were doing business as merchants or traders [*or otherwise*] at the city of \_\_\_\_\_, under the firm-name of A. B. & Co.

203. *By Surviving Partner, on a Cause of Action which accrued to his Firm.*

I. That at the time hereinafter mentioned, this plaintiff and one C. D. were partners doing business under the firm-name of A. B. & Co.

II. [*Set forth the cause of action.*]

III. That thereafter and before this action [*or, on the day of* \_\_\_\_\_,] said C. D. died, leaving this plaintiff the sole-surviving partner of the firm. (*d*)

## XII. PUBLIC OFFICERS.

204. *By a Single Officer. (e)*

Robert Denniston, as comptroller of the State of New York, ( <i>f</i> ) against John Jones.	}
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The plaintiff complains, and alleges:

I. That he is the comptroller of the State of New York. (*g*)

(*d*) If the cause of action accrued to the partnership, the death and the survivorship must be averred, though it is otherwise if the cause of action accrued to the survivor, even where consideration was one which proceeded from the partnership.

(*e*) An action by public officers, as such, should generally be brought in

the individual name, with the title of office annexed. *Paige v. Fazackerly*, 26 Barb., 392; 2 Rev. Stat., 474, § 96.

(*f*) This form is from the report of the Commissioners of the Code (No. 12).

(*g*) This allegation is proper, and might be required on motion, if omitted, though the complaint would be good on demurrer without it, if the

By Officers.

205. *By a Board of Officers. (h)*[*Name of the court, &c.*]

The Board of Commissioners of Ex-  
cise (i) in and for the county of  
                    , plaintiffs,  
                    against  
Y. Z., defendant.

The plaintiffs as Board of Commissioners of Excise aforesaid,  
complain of the defendant, and allege:

206. *By the Attorney-general. (j)*[*Name of the court, &c.*]

The People of the State of New York,  
on the relation of A. B., plaintiffs,  
                    against  
Y. Z., defendant.

fact that he sued as such officer were  
alleged. *Gould v. Glass*, 19 *Barb.*, 185 ;  
*Smith v. Levinus*, 8 *N. Y.* (4 *Seld.*), 447.

(h) A proceeding to compel the supervisors to exercise their discretion in auditing a claim against the county, should not be against the supervisors individually, specifying in the process, pleadings, and proceedings, their name of office, pursuant to 2 *Rev. Stat.*, 474, § 96. It is not an action against the "officers named in section 92," to which the provision of section 96 refers, but since it is to compel a performance of duty by the board, and not by the supervisors individually, it should be brought against the board. *People ex rel. Plumb v. Supervisors of Cortland*, 24 *How. Pr.*, 119.

(i) Inserting the individual names of the members of the board in the caption of the complaint does not render the complaint defective, if the complaint alleges that they are such officers, and sue as such, and for a cause of action which accrued under the statute to them as such. *Hait v. Benson*, 18 *How. Pr.*, 302.

Thus actions by the commissioners of highways may be properly brought in the names of the individuals, with the addition of their name of office; but if so brought, the complaint should show, by proper averments in the body of it, that the claim is made by the officer and not by the individual. *Gould v. Glass*, 19 *Barb.*, 179.

(j) *Code of Pro.*, § 434.

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 Complaint by Sheriff.
 

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The People of the State of New York, by M. N., their attorney-general, and A. B., the individual plaintiff above named, complaining of the defendant, allege:

207. *By Sheriff (k) swing in Aid of Attachment.*

I. That he is the sheriff of the [city and] county of \_\_\_\_\_, duly elected, qualified, and acting as such.

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, he received a warrant of attachment, duly issued out of this court, and to him directed and delivered, as such sheriff, in an action against M. N., whereby he was directed to attach and keep all the property of said M. N. in his county.

III. That the defendant then had in his possession \$300 belonging to M. N. [or, was indebted to the said M. N. in the sum of \_\_\_\_\_ dollars for, *here state briefly the cause of action*].

IV. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the plaintiff made due service of said warrant of the defendant, by delivering to, and leaving with him a copy, with a notice showing the property levied on; whereupon the plaintiff became entitled to receive from the defendant, and he became answerable to the plaintiff for said \$300, which the defendant refuses to pay over to the plaintiff, or to account to him for; to his damage \_\_\_\_\_ dollars. (l)

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(k) Where the action is by the plaintiff in the attachment, see *Form* 26, p. 18, *ante*.

In an action against a sheriff to recover damages for wrongful acts of his deputy, it is not essential that the complaint should allege that he is sheriff, nor that the acts complained of were committed by his deputy. Those facts may be proved under a general averment that the defendant did the

acts in question. *Curtis v. Fay*, 37 *Barb.*, 64; *Poinsett v. Taylor*, 6 *Cal.*, 78.

(l) This form is taken from, and supported by *Kelly v. Breusing*, 33 *Barb.*, 123; affirming S. C., 32 *Id.*, 601. The sheriff need not show the validity of his title to the office, nor the jurisdiction of the court which issued the attachment, nor need he set forth the exact terms of the notice by which he executed it. *Id.*

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 Allegations of Appointment of Receiver.
 

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XIII. RECEIVERS. (*m*)208. *Appointment in Supplementary Proceedings.*[*Title of the cause.*]

A. B., complaining as receiver (*n*) of the property of M. N., alleges: [*set forth cause of action accruing to the judgment-debtor*].

II. That on the            day of           , 18   , at           , upon an application made by O. P., a judgment-creditor of said M. N., in proceedings supplementary to execution, and by an order or determination then duly made by Hon.           , one of the justices of the Supreme Court [*or, county judge for the county of*], the plaintiff was appointed receiver of the property of said M. N. (*o*)

(*m*) A receiver suing by virtue of his title and authority as such, should state the time and place of his appointment, and distinctly aver that he has been appointed by an order of the court. Alleging that he was duly appointed on such a day is not sufficient. *White v. Low*, 7 *Barb.*, 204; *Gillett v. Fairchild*, 4 *Den.*, 80; *Bangs v. McIntosh*, 23 *Barb.*, 591. Describing himself as "having been duly appointed receiver of, &c., and bringing this suit by order of the Supreme Court," is insufficient on demurrer. *Dayton v. Connah*, 18 *How. Pr.*, 326. But it is not necessary for him in his complaint, to set out all the proceedings by which he was appointed. Alleging that plaintiff is receiver of, &c., appointed by the Supreme Court by an order made on a specified day, on condition of filing security, and that such security was given accordingly, states enough to enable the defendant to take issue upon the legality of the plaintiff's appointment. *Stewart v. Beebe*, 28 *Barb.*, 34. Compare *Crowell v. Church*, 7 *Abbotts' Pr.*, 205, *note*.

On the other hand, where the receiver's title to the thing in action is

not derived through his appointment, but arises from the fact that the contract was made with him as receiver, it is not necessary for him to set forth his appointment, but he may sue, simply describing himself as receiver. In such case, to an answer denying that the defendant is indebted to him individually, and alleging that the note described in the complaint belongs to a receiver, he may reply that he is the same receiver. The answer in such case, to be sufficient, ought to aver that the receiver whom it alleges to be the holder of the note was a different person from the plaintiff. *White v. Joy*, 13 *N. Y.* (3 *Kern.*), 83; reversing *S. C.*, 11 *How. Pr.*, 36.

(*n*) The complaint should show distinctly that the plaintiff sues in his official character.

(*o*) This form is from *Edw. on Rec.*, 383.

In *Campbell v. Foster*, 16 *How. Pr.*, 275, it was held that the complaint of a receiver appointed in supplementary proceedings under section 292 of the Code, which did not allege that any execution was issued, &c., in the proceedings in which the plaintiff was appoint-

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Allegations of Appointment of Receiver.

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III. That thereafter, and before the commencement of the present action, he gave his bond required by the said order, as such receiver, approved by the said justice, which bond, with such approval, are on file in the said Court, and were so there prior to the commencement of this action.

209. *Another Form, setting forth the Proceedings at Length. (p)*

I. That N. B. and L. S., of Albany, survivors of A. C., deceased, in an action brought by them in the Supreme Court of this State against H. H., obtained judgment against the defendant in that action, on, &c., for the sum of, &c., which judgment for the said sum was entered by the clerk of the county of , on the day last aforesaid, and the roll filed and judgment docketed in said clerk's office on that day; that said defendant then resided, and still resides in the county of ; that a transcript of said judgment was filed, and judgment docketed in the clerk's office of the said county of , on, &c.

II. That on, &c., an execution therefor was duly issued by plaintiff's attorney to, and delivered to the sheriff of said county of , commanding him to make said, &c., with interest from, &c., and make return of his doings in the premises; that said sheriff afterwards, and on, &c., returned said execution to the office of the clerk of the county of , with his return thereon indorsed, showing the execution wholly unsatisfied.

III. That afterwards, and on, &c., the plaintiff in said action, caused an affidavit to be made, setting forth the above facts, as

ed, was bad on demurrer. The court would not presume that execution was issued, and that the defendant resided in the county where it was issued; and this was essential to the plaintiff's authority. But the contents of the pleading are not stated, in the report. The above form is authorized by section 162 of the Code, providing a short form for pleading judgments, &c.

Leave to sue need not be averred. It should be obtained to protect the

party suing from costs, &c.; but the omission to obtain it is a matter of practice. Even where the statute forbids a suit without leave,—*e. g.*, upon a judgment of a court of record within five years,—leave is not one of the facts constituting the cause of action; and the proper remedy for neglecting to obtain it is by motion, not demurrer. *Finch v. Carpenter*, 5 *Abbotts' Pr.*, 235.

(p) This form is from *McCall's Forms*, 270.

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 Allegations of Appointment of Receiver.
 

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to obtaining said judgment, the filing of transcript, the issuing and return of said execution, and that the said judgment remained wholly unsatisfied, and presented the same to Hon. \_\_\_\_\_, one of the justices of the Supreme Court, on the same day, who thereupon, and on, &c., made an order requiring said judgment-debtor to appear before H. S., Esq., referee thereby appointed, at the office of the said H. S., in, &c., on, &c., at \_\_\_\_\_ o'clock in the \_\_\_\_\_ noon, to make discovery on oath, concerning his property; and said H. P., by said order was further forbidden to transfer, dispose of, or in any manner dispose of, or interfere with any property, moneys, or things in action belonging to him until further order in the premises.

IV. That said order was personally served on said defendant, on the same day, and said defendant appeared before said referee at the time and place in said order specified, and severally submitted to an examination under oath, making discovery as to this property; which examination was on the same day, by said referee, certified to said judge, who thereupon, by an order, appointed S. M., of, &c., this plaintiff, receiver of all the debts, property, effects, equitable interests, and things in action of said H. P., and further ordered that this plaintiff, before entering upon the execution of his trust, execute to the clerk of this court a bond, with sufficient sureties to be by said judge approved, in the penal sum of \_\_\_\_\_, conditioned for the faithful performance and discharge of the duties of such trust, and that this plaintiff upon filing such bond in the office of the clerk of the county of \_\_\_\_\_, be invested with all rights and powers as receiver according to law. Said H. P. was therein and thereby enjoined and restrained from making any disposition of, or interfering with his property, equitable interests, things in action, or any of them, except in obedience to said order, until further order in the premises.

V. Plaintiff further says, that on, &c., he executed a bond with sureties, as required by said order and the rules and practice of this court, which was approved by said justice, and filed in the office of the clerk of the county of, &c.

*[Allege cause of action.]*

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 Allegations of Appointment of Receiver.
 

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210. *Appointment Pending Litigation.*[*Title, &c., as above.*]

II. That on the            day of           , 18   , at the city of New York, in an action then pending in the Court of Common Pleas for said city, wherein M. N. was plaintiff and O. P. was defendant, upon an application made by said M. N., and by an order or determination duly made by said court, this plaintiff was appointed receiver of the property hereinafter described.

III. [*As in Form 208.*]211. *Receiver of Dissolved Corporation. (q)*[*Title of the cause.*]

The plaintiff, complaining as receiver of the            Company, alleges:

[*Set forth cause of action accruing to the corporation.*](r)

II. That on the            day of           , 18   , at           , upon an application made upon occasion(s) of the insolvency of the said            Company [or, upon occasion of the voluntary dissolution of the said            Company], and by an order or determination by the Supreme Court in and for the county of           , the plaintiff was appointed receiver of the prop-

(q) As to the cases in which a receiver may sue in his own name and without averring his appointment, see *White v. Joy*, 13 *N. Y.* (3 *Kern.*), 83; reversing *S. C.*, 11 *How. Pr.*, 36; *Bank of Niagara v. Johnson*, 8 *Wend.*, 645; *Haxtun v. Bishop*, 3 *Id.*, 13.

(r) Where a plaintiff claims title to a note sued on by virtue of his appointment as receiver of an insurance company, the note being payable to a company bearing a name different from that of the company of which he is receiver, it is necessary that he should, by proper averments, show that the note is a part of the assets of the company of which he has been appointed

receiver. If the change of name was by a reorganization of the company under the general act, a general averment of the fact of reorganization is enough. *Hyatt v. McMahon*, 25 *Barb.*, 457.

(s) The occasion of the dissolution should be shown. *Gillet v. Fairchild*, 4 *Den.*, 80.

The objection, that a plaintiff suing as receiver of a corporation does not show that his appointment was founded on a petition, does not apply where the receiver was appointed on consent of the corporation, in an action brought under 2 *Rev. Stat.*, 463, § 40 *Tuckerman v. Brown*, 11 *Abbotts' Pr* 389.



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 Allegations of Appointment of Receiver.
 

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erty, and effects, and things in action of the said Com-  
pany, pursuant to statute.

III. [*As in Form 208.*]

212. *The Same, Another Form. (t)*

John F. Butterworth, as receiver, &c., of the Island City Bank, a corporation located in the city of New York, and incorporated under and by virtue of an act of the Legislature of the State of New York, entitled "An Act to authorize the Business of Banking," passed April 18th, 1838, and of the several acts supplemental or amendatory thereto, the plaintiff in the above-entitled action by this his complaint respectfully shows to the court and avers :

*First*, That by an order of the Supreme Court, made at a special term thereof, held at the new City Hall of the city of New York, on the twenty-fifth day of September, 1857, before Justice Peabody, said plaintiff was, pursuant to an act of the Legislature of the said State, entitled "An Act to enforce the responsibility of stockholders in certain banking corporations and associations, as prescribed by the Constitution, and to provide for the prompt payment of demands against such corporations and associations," passed April 5th, 1849, duly appointed receiver of all and singular the property and effects of the said Island City Bank, which said bank had therefore been declared insolvent under said act, with all the powers, and subject to all the duties of receivers in such cases.

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(t) This is the form of the complaint 187; S. C., 7 *Abbotts' Pr.*, 456; 16 *How.* in *Butterworth v. O'Brien*, 28 *Barb.*, *Pr.*, 503; affirmed, 23 *N. Y.*, 275.

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 Analysis of Chapter.
 

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## SECTION II.

## COMPLAINTS IN ACTIONS FOR MONEY LENT, PAID, HAD, AND RECEIVED, ETC.

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## I. MONEY LENT.

213. *Lender against Borrower.*

I. That on the twentieth day of October, 1857, at the city of Rochester, (a) the plaintiff lent to the defendant (b) the sum of

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(a) The language of the books is that every material fact must be stated with *certainty*; and this means particularity with respect to the details of the fact alleged, sufficient to distinguish it from any other similar fact. For instance, in the above form, the statement of the time and the place of making the alleged loan could not be omitted without rendering the allegation uncertain according to the use of that term at common law, since it would not then fully describe the transaction it had reference to. The details, which were thus held essential to be stated are, however, in themselves often immaterial,—that is, matters of description merely, for the purpose of identification, and not matters of substance which may afford ground for an issue. If, for instance, the defendant should answer in this case, that he denied that he ever borrowed any money from the plaintiff at Rochester, his answer would be frivolous.

Under the old practice, it was customary to state incidents of time, place, quantity, &c., under a *videlicet*,—*e. g.*, “that heretofore, viz.,” as it had been said by good authorities that the omission of a *videlicet* will render it necessary to prove such matter precisely as laid, even though it was immaterial. But even then the better opinion was, that the use of a *videlicet* did not make that immaterial which would other-

wise have been material; and on the other hand, that the omission of the *videlicet* did not make that material which would otherwise have been immaterial. 1 *Chit. Pl.*, 277, note *m*, and cases there cited; 2 *Campb.*, 307; 1 *Saund.*, 170, note 2; Vail *v.* Lewis, 4 *Johns.*, 450; Gleason *v.* McVickar, 7 *Cow.*, 42; Ladue *v.* Ladue, 16 *Verm.*, 189. The Code provides that “when the allegations of a pleading are so indefinite and uncertain that the precise nature of the charge or defence is not apparent, the court may require the pleading to be made more definite and certain, by amendment.” *Code*, § 160.

It may be said that in general under the new practice both in England and in this country, the common-law rule, that time and place must be averred of every material or traversable fact, is abrogated. If time, in itself, is material it ought to be stated; but where the only materiality of it is to show that one fact occurred after another one, it is sufficient to state that the one was subsequent. And where the allegation of time is wholly omitted, if the adverse party is really embarrassed he may move to have the pleading made more definite and certain on showing how he is prejudiced. When, however, the precise time is material to be proved, for instance in the case of a notice of demand and non-payment of the note to charge the indorser, or in

## Common Complaint for Money Lent.

dollars, on condition that it should be repaid [with interest] upon demand (c) [or, repaid on the . day of , 18 ].

II. That thereafter and before this action [or, on the day of , 18 ], (d) the plaintiff duly demanded (e) payment of the same from the defendant, but no part thereof has been paid (f) [or, if any payments have been made, no part thereof

the case of the period for which alleged usurious interest is reserved, it must be stated, and truly stated. (See, also, on this subject, *Swan on Pl.*, 138; *Castro v. Wetmore*, 16 *Cal.*, 379.) This is a simple and convenient rule. The pleader must allege the material facts, and the mere circumstances of time and place need not be stated except where the omission would leave the pleading such "that the precise nature of the charge or defence is not apparent;" and even in such case a demurrer ought not to be sustained; but the party aggrieved by the uncertainty must move to compel an amendment. There seems no reason for using the *videlicet* under the Code, except as sometimes a concise way of indicating a lack of positive knowledge respecting the time, sum, or name mentioned.

(b) Wherever a request is essential to the defendant's liability, it must be averred. *Spear v. Downing*, 34 *Barb.*, 522; *S. C.*, 12 *Abbotts' Pr.*, 437.

Mr. Greenleaf states that a request is material to be proved in this action (2 *Greenl. on Ev.*, 93, § 107); but we omit the separate statement, "at his request," upon the authority of the recent case of *Victors v. Davis*, 1 *Dowl. & L.*, 984. Upon principle, it seems unnecessary to aver request in an action for money lent, for the reason that a request is implied in the very idea of a loan, although it is necessary to prove a request, in order to constitute a loan. And see *Brown v. Garnier* (6 *Taunt.*, 389; *S. C.*, 1 *Eng. Com. L. R.*, 421),

where it was held that "hired" implies a request; and *Emery v. Fell* (2 *T. R.*, 28), and *Glenny v. Hitchins* (2 *Code R.*, 56; *S. C.*, 4 *How. Pr.*, 98), where it was held that "sold and delivered" imply a request.

(c) It is not necessary to state when the debt was to be repaid except for the purpose of fixing a date for interest. The presumption of law is, that it was to be paid immediately. *Peets v. Bratt*, 6 *Barb.*, 662. Nor is it necessary to show that the debt had become payable at the commencement of the action. If it had not, that is matter of defence, to be set up in the answer. *Smith v. Holmes*, 19 *N. Y.*, 271; *Maynard v. Talcott*, 11 *Barb.*, 569.

(d) The time of demand will only be material where interest commences to run therefrom.

(e) Where a special request is necessary to be averred, the general allegation of "though often requested" is not enough. *Bush v. Stevens*, 24 *Wend.*, 256; *Whitton v. Whitton*, 38 *N. H.*, 127. Though the defect was cured by verdict even at common law. *Leffingwell v. White*, 1 *Johns. Cas.*, 99. But an allegation that he "refused, &c., though then and there particularly requested so to do," is a sufficiently explicit allegation of a request. *Supervisors of Allegany v. Van Campen*, 3 *Wend.*, 48.

(f) The allegation of non-payment is usual, but perhaps may not be essential. Compare *Lanning v. Carpenter*, 20 *N. Y.*, 458; *McKyring v. Bull*, 16 *Id.*, 297.

## Admitting Payments.

has been paid, except—*state briefly the total of payments*], (g) and the defendant is now justly indebted therefor to this plaintiff in the sum of                      dollars, with interest, from the 20th day of October, 1857 [*or, if it was to be repaid on demand, claim interest from the day of demand*].

214. *On an Account, by Assignee of Lender against Borrower.* (h)

I. That on the                      day of                      , 18    , at the city of                      , (i) the defendant was indebted to one M. N., in the sum of                      dollars on an account (j) for money lent

(g) The plaintiff need not state payments made on account of the claim in suit, but may declare upon the original cause of action entire, and leave defendant to show his payments by way of defence. The spirit of the Code, however, requires parties always to plead truthfully; and there is a necessity to do so, where the complaint is to be verified. It is usual to deny payment before suit brought; and he cannot do this under oath, as to the whole claim, where part-payments have been made. In such case he should briefly state what amount has been paid, not because it is necessary to anticipate the defence, or to state the payments as entering into the statement of his cause of action, for it is not (*Van Demark v. Van Demark*, 13 *How. Pr.*, 372; *Giles v. Betts*, 15 *Abbotts' Pr.*, 285), but to enable him to deny payment as to the balance; and to prevent defendant from answering. But defendant may then prove payments under a general denial. *Quin v. Lloyd*, 41 *N. Y.*, 349.

(h) This form is supported by *Cudlipp v. Whipple*, 1 *Abbotts' Pr.*, 106; and *Allen v. Patterson*, 7 *N. Y.* (3 *Seld.*), 476; *Freeborn v. Glazier*, 10 *Cal.*, 337. *De Witt v. Porter*, 13 *Id.*, 171; *Beekman v. Platner*, 15 *Barb.*, 550; *Merwin v. Hamilton*, 6 *Duer*, 244; *Second Avenue R. R. Co. v. Coleman*, 24 *Barb.*,

300; *Tucker v. Rushton*, 7 *N. Y. Leg. Obs.*, 315; *S. C.*, 2 *Code R.*, 59; *Graham v. Camman*, 5 *Duer*, 697.

(i) This is a sufficient statement of the place, where the payments in the account mentioned were made. *Emery v. Fell*, 2 *T. R.*, 28.

(j) We think the practitioner should be somewhat cautious how he employs this general form of complaint, except in cases where the items of the claim are embraced in an account. The case of *Allen v. Patterson*, 8 *N. Y.* (4 *Seld.*), 476, decided simply that a *demurrer*, on the ground that the complaint did not state facts sufficient to constitute a cause of action, would not lie to a complaint merely alleging—"that the defendant is indebted to the plaintiffs in the sum of, &c., on an account, &c." But the question whether a *motion* against this complaint, on the ground that it was indefinite and uncertain, would lie, was left wholly untouched. That question was presented in *Cudlipp v. Whipple*, 1 *Abbotts' Pr.*, 106, which was an action by assignees of a demand upon an account. The allegations of the complaint in relation to the demand, were,—“that the defendant was indebted, &c., in the sum of, &c., being a balance of an account due from said defendant to said W., on an

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Assignee on an Account for Money Lent.

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by said M. N. to said defendant, and for money paid, laid out, and expended by said M. N. to and for the use of said defendant, and at his request.

II. That thereafter said M. N. duly assigned (*k*) said indebtedness to this plaintiff, of which the defendant had due notice, but no part of the same has been paid, and there is now due and payable to this plaintiff, thereon, from the defendant, the sum of, &c.

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account for money lent by said W. to said defendant, and for money paid, laid out, and expended by said W. to and for the use of said defendant, and at his request." On defendant's motion to make the complaint more definite and certain, the court held that the action being upon *an account*, the remedy of defendant for any lack of fulness in details furnished by the complaint, was not by motion, as sought, but by demanding a copy of the account referred to; under the provisions of section 158 of the Code.

Neither of these cases are authorities for the position that this form is sufficiently definite and certain, in an action *not* upon an account. And the result of the cases would seem to be, that where the action is not on an account, this complaint may be obnoxious to a motion to make it more definite and certain, if defendant is prejudiced by its want of particularity. *Eno v. Woodward*, 4 *N. Y. (4 Comst.)*, 249; *Blanchard v. Strait*, 8 *How. Pr.*, 83; *Wood v. Anthony*, 9 *Id.*, 78; *Chesborough v. N. Y. & Erie R. R. Co.*, 13 *Id.*, 557; *Graham v. Camman*, *Id.*, 360; *Hall v. Southmayd*, 15 *Barb.*, 32. But it is not necessarily obnoxious to such a motion. *Adams v. Holley*, 12 *How. Pr.*, 323; *Dows v. Hotchkiss*, 10 *N. Y. Leg. Obs.*, 281.

An account for various items may be alleged as a single cause of action, though the items accrued at different times; and an averment of a promise is not necessary in order to avoid the

objection of duplicity, but is redundant, *Dows v. Hotchkiss*, 10 *N. Y. Leg. Obs.*, 281. We regard this as the true rule, and it is further supported by the cases above cited, though the contrary was held in *Acome v. American Mineral Co.*, 11 *How. Pr.*, 24.

Where the action is for a legal remedy in distinction from equitable relief, items which accrued to him in his own right should be stated as a separate cause of action from such as came to him by assignment under the Code, and for which, before the Code, he could not sustain an action in his own name; and in case he wishes to include causes of action assigned to him by different persons, there should be a count for each of such classes. But if the action be in fact for an accounting, it may be treated as one cause of action of an equitable nature, and stated accordingly. *Adams v. Holley*, 12 *How. Pr.*, 326.

(*k*) In a complaint seeking to set off a judgment held by the plaintiff as assignee, against one recovered by defendant against the plaintiff, the time of the assignment is stated with sufficient definiteness if it is said that the judgment against the plaintiff was recovered after the assignment. An allegation that the third person "assigned, sold, and set over to the plaintiff the said judgment," sufficiently alleges an absolute assignment, and the consideration for the assignment need not be stated. *Martin v. Kanouse*, 2 *Abbotts Pr.*, 330.

## Implied Promises.

II. MONEY PAID. (*l*)215. *By One having paid Money to a Third Person at Defendant's Request.*

I. That on the            day of           , 18 [at           ], at the request of the defendant, the plaintiff paid to one M. N. dollars.

II. That in consideration thereof, the defendant promised to repay the same to the plaintiff [on demand]. (*m*)

III. That [on the            day of           , 18   , the plaintiff demanded payment of the same from the defendant, but] he has not repaid the same. (*n*)

(*l*) A partner against whom a judgment is recovered in an action for an accounting, and who is subsequently compelled by legal process to pay partnership debts, to an amount equal to the sum remaining unpaid upon the judgment, cannot maintain an action against his former partners to have the amount paid by him ascertained, and allowed to him as payment on the judgment. He can obtain relief, *it seems*, only by a bill of review, or supplemental bill in the nature thereof. *Hayes v. Reese*, 34 *Barb.*, 151.

(*m*) Implied promises need not be alleged in pleading under the Code. It is sufficient to state the facts from which the law infers a liability or implies a promise; for these are the facts constituting the cause of action. *Farron v. Sherwood*, 17 *N. Y.*, 227; *Jordan & Skaneateles Plank-road Co. v. Mosley*, 23 *Id.*, 552; *Byxbie v. Wood*, 24 *Id.*, 607; *Swan's Pl.*, 174; and see, also, *Berry v. Fernandez*, 1 *Bing.*, 338; *Dunford v. Messiter*, 5 *M. & S.*, 446.

If there was an express promise, it should be alleged as in the form above;

but if not, that allegation may be omitted, and the object of the payment may be briefly stated, so far as necessary to complete the facts upon which the law implies a promise.

(*n*) No demand is necessary for the purpose of fixing a date for the commencement of interest.

Interest should be claimed from the day when it is due, as follows:

Where money is expended by plaintiff on an understood condition that defendant would pay the principal on demand, and demand was made,—from the date of the demand.

Where money is expended on such condition, but there was *no demand*,—from the date of the commencement of the suit.

Where money is expended on a promise to repay it at a *particular time* though without mention of interest, and though no demand was made,—from the date when payment became due by the promise.

Where money is expended on a promise to repay it *with interest*,—from the *date* of the expenditure.

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 Complaints for Money Paid.
 

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 216. *By One having paid the Debt of Another, to be Repaid on Demand.*

I. That on the            day of           , 18   , [at           ,] this plaintiff paid to the use of the defendant, at his request, (o) and on condition that the same should be repaid on demand, the sum of            dollars, in paying to one M. N. one quarter's rent of the house then occupied by the defendant (p) [or, otherwise show what the debt was].

II. That this plaintiff, on the            day of           , 18   , at           , duly demanded (q) payment of the same from the defendant, but no part thereof has been paid [or, no part thereof has been paid, except—amount of payment made, if any].

 217. *By One having paid the Debt of Another, to be Repaid on a Day Certain.*

I. That on the            day of           , 18   , at           , this plaintiff paid, to the use of the defendant, and at his request, the sum of            dollars, in paying to one M. N. the amount of a promissory note made by the defendant.

II. That defendant promised to repay said sum [with interest] to this plaintiff on the            day of           , 18   , but has not paid any part thereof [except, &c.]

(o) An averment of request is necessary in a complaint for money paid, laid out, &c. See 2 *Greenl., Ev.*, 93, § 107, and *note*. The request may be implied or express. As to the cases in which it will be implied, see *Id.*, 102, § 114.

If it be only implied, the facts raising it may be alleged, instead of averring it as if it were express. See subsequent forms.

(p) The above complaint might be good on demurrer if the words descriptive of the claim against the defendant which was paid off by plaintiff, were omitted. But it would be obnoxious to a motion to make the complaint more definite and certain, if the defendant needed to be informed of the particu-

lars of the debt alleged to have been paid on his behalf, in order that he might identify it with that which he requested the plaintiff to pay, and ascertain whether it was in truth paid. *Chesborough v. N. Y. & Erie R. R. Co.*, 13 *How. Pr.*, 557.

In general the plaintiff should, as fully as he can, distinguish the claim from others that may have existed against the defendant. Where the circumstances of the payment are presumably within the defendant's own knowledge, less detail will be necessary than in other cases;—*e. g.*, where a note made by defendant is paid, a very general description of the note will be sufficient.

(q) The commencement of the suit



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 For Money Paid on Notes and Bills.
 

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218. *By Maker of Accommodation Note, having paid it. (r)*

I. That on the            day of           , 18   , at           , the plaintiff made and delivered to the defendant his promissory note, of which the following is a copy: [*or, state its legal effect, as in Form 220*].

II. That the plaintiff never received any consideration therefor, but it was an accommodation note, made and given to the defendant, at his request, and upon his promise that he would pay it at maturity.

III. That as the plaintiff is informed and believes, the defendant thereafter and before its maturity negotiated it for value.

IV. That he failed to pay it at maturity, and that the plaintiff was thereupon compelled (s) to pay it; and did on the day of           , 18   , at           , pay it, and that no part of the same has been paid to the plaintiff.

219. *By Acceptor without Funds, against Drawer.*

I. That the defendants, on the            day of           , at           , became indebted to him for moneys advanced by him, and by him paid in taking up a certain draft drawn by the defendants, by their firm-name of X. Y. Z. & Co., bearing date on the day of           , whereby they requested this plaintiff            days after date to pay to one M. N. the sum of            dollars.

II. That the plaintiff duly accepted said draft, and paid it at maturity, without funds of the defendant in his hands to meet the same; and that no part of the same has been repaid by the defendants.

is a sufficient demand, except for the purpose of recovering interest where there was no promise to pay interest, or to pay the principal at a particular time.

(r) An accommodation maker or indorser is a surety, and may sue as such to recover payments made by him. *Baker v. Martin*, 3 *Barb.*, 634; *Neass v. Mercer*, 15 *Id.*, 318.

(s) If the accommodation maker was sued, insert here, "by suit brought against him by M. N., the holder, in the            Court." *Packard v. Hill*, 7 *Cow.*, 442. He may recover the costs of suit unless it was evident that he had no defence. *Parsons' Merc. L.*, 93, and *note*; *Stratton v. Matthews*, 12 *Jur.*, 924; *Baker v. Martin*, 3 *Barb.*, 634, and cases there cited.

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 Complaints for Money Paid.
 

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220. *By Indorser of Note, having paid a Part.* (t)

I. That on the       day of       , 18       , at       , the defendant made and delivered to this plaintiff his promissory note, whereby he promised to pay to the order of the plaintiff,       days after date, the sum of       dollars, for value received [*or, set out copy of the note, as in Form 218*].

II. That thereafter, and before maturity of said note, the plaintiff indorsed it and negotiated it for value.

III. That at the maturity it was duly presented for payment to the defendant [*or, allege excuse for non-presentment*], but was not paid, whereof the plaintiff had due notice, and that thereafter this plaintiff was compelled to pay, and on the       day of       , 18       , at       , did pay, to one M. N., the holder of said note, on account of the amount due thereon from the defendant, the sum of       dollars. No part of which has been repaid to the plaintiff.

221. *By Stock-brokers, for Money advanced on account of their Principal.* (u)

I. That the plaintiffs are partners, doing business in the city of New York as bankers and brokers, under the firm-name of W. S. & M. (v)

II. That as stock-brokers, on or about the       day of       , 18       , they purchased for and on account of the defendant, and at his request, the following stocks: [*designating the stocks and prices*]; said stocks to be paid for by the defendant

(t) Where an indorser has paid up the whole of a note and become the legal owner of it, he can either sue the maker or the prior indorser, or both, on the note. Or perhaps he can sue either one for money paid, &c. *Baker v. Martin*, 3 *Barb.*, 634; *Wright v. Butler*, 6 *Wend.*, 290. But where he has only paid it in part, he must sue for the amount actually paid, as for money paid to the use of the maker or prior indorser. *Wright v. Butler*, *Id.*, 284; affirming *S. C.*, 20 *Johns.*, 367; and 2

*Wend.*, 369; *Pownall v. Ferrand*, 6 *Barnw. & C.*, 439; *S. C.*, 13 *Eng. Com. L. R.*, 230; *Baker v. Martin*, 3 *Barb.*, 634; *Dygert v. Gros*, 9 *Id.*, 506. It seems that separate prior indorsers can not be joined as defendants in such an action for money paid, &c. *Barker v. Cassidy*, 16 *Id.*, 177.

(u) This form is sustained by *Whitehouse v. Moore*, 13 *Abbotts' Pr.*, 142.

(v) This is a material averment in this action. See *Hearne v. Keene*, 5 *Bosw.*, 584

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For Money Paid on Purchase of Stocks. On Tax.

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at the expiration of thirty days from the day of purchase, with the right to the defendant to pay for said stocks at any time before the expiration of said thirty days, should he so elect.

III. That it is the custom of brokers in such cases to purchase the stocks in their own names, without disclosing the name of their principal; and in case of the failure of the principal in paying the purchase-money, to resell the stocks without notice to or demand upon him or tendering him the stock, and to charge him with the deficiency and their commissions, which custom the defendant then well knew. (*w*)

IV. That according to said custom, the plaintiffs purchased said stocks in their own names, and without disclosing the defendant's name.

V. That on or about the                      day of                      , 18                      , the defendant paid to the plaintiffs, on account of the said purchase of stock,                      dollars.

VI. That at the expiration of the said thirty days, the defendant having failed to pay the balance due for said stocks, the plaintiffs, being liable therefor, paid for the same, and to reimburse themselves did, in accordance with the custom of brokers in such cases, without notice to or demand upon the defendant, or a tender to him of said stocks, sell the same on his account, at [*stating the price, it being below cost*].

VII. That there is now due and payable to the plaintiffs from the defendant, on account of the said purchase of stock, the sum of                      dollars, together with the sum of                      dollars for commission for the purchase and sale of said stocks.

*222. By Landlord, having paid Tax (x) which Tenant had agreed to pay.*

I. That at                      , on or about the                      day of                      , 18                      , the plaintiff and the defendant entered into an agreement, of

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(*w*) It is better to set forth thus the nature of the custom, than merely to allege that what plaintiffs' did was in accordance with a custom of brokers; but adding that defendant knew it is not essential. *Whitehouse v. Moore, supra*. Unless such a custom is alleged, the plaintiff must aver that he had demanded payment of the price, and had transferred or offered the stocks to his principal. *Merwin v. Hamilton, 6 Duer, 244*.  
 (*x*) In an action brought by a widow, to whom a life-estate in certain parts of a house have been assigned as dower, against the owner of the fee, to recov-

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 Complaint for Money Paid by Surety.
 

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which the following is a copy : [*set forth agreement or lease, or say, an agreement by which the defendant hired of the plaintiff a house in                   , and further agreed, &c., reciting stipulation to pay tax*].

II. That there was duly laid upon said premises for the year 18   , and while the covenants of the aforesaid agreement were in full force, and the defendant was in possession of the premises by virtue thereof, a tax of       dollars, which the defendant neglected to pay [and that said plaintiffs were not aware, until on or about the       day of       , 18   , of such neglect].

III. That by reason thereof the plaintiff was, on the day of       , 18   , compelled to pay the said sum of       dollars, with       dollars arrearages of interest, amounting in the whole to       dollars.

IV. That no part thereof has been repaid.

223. *By Surety on Lease, against Principal.*

I. That on or about the       day of       , 18   , the defendant entered into an agreement in writing with one M. N., of which the following is a copy : [*setting it forth. Or say, an agreement in writing, whereby he hired of M. N., the house, designating it, for the term of       , and agreed to pay therefor, to the said M. N., the rent of       dollars in equal quarterly instalments*].

II. That at the request of the defendant, the plaintiff made and delivered to the defendant his guaranty thereon, in writing, of which the following is a copy : [*setting it forth. Or say, his guaranty thereon, in writing, whereby, in consideration of one dollar, the plaintiff guarantied the faithful performance on the part of defendant of the said agreement*].

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er a sum averred to be his fair proportion of taxes, &c., upon the whole premises, paid by her to protect her estate under his neglect, no averment of request or promise is necessary. The law implies it. Omitting to state what part of the premises are in defendant's possession, or that any specified portion is in his possession, does not render the complaint demurrable, but at most obnoxious to a motion that it be made

more definite and certain. *Graham v. Dunnigan*, 4 *Abbotts' Pr.*, 426 ; S. C., 6 *Duer*, 629.

Upon a lessee's breach of his covenant for the payment of taxes, the lessor's right of action is perfect without a previous demand of the tenant of the payment of such taxes, or of the repayment to the lessor, if he has paid them for his tenant. *Garner v. Hannah*, 6 *Duer*, 262.

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Money Paid on Guaranty. On Undertaking on Appeal.

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III. That the defendant delivered said agreement and guaranty to M. N., and thereupon, and in consideration thereof, obtained and had possession of said premises, pursuant to said agreement, whereby the defendant became liable to the said M. N. for the rent therein named. (*y*)

IV. That a portion of it, to wit, the instalment of        dollars, which became due on the        day of        , 18    , the defendant failed to pay.

V. That the plaintiff was compelled to pay, and did pay on the        day of        , 18    , at        , to the said M. N., at his request, and to the use of the defendant, the sum of        dollars, being the aforesaid sum, with interest, and that no part of the same has been repaid to the plaintiff.

224. *By Surety against Principal, for Money paid on Undertaking on Appeal.*

I. That on the        day of        , 18    , one M. N. recovered in the Court of        a judgment duly given against the defendant for        dollars [*or*, for the possession of specific property, &c.], from which the said defendant appealed to the Court of Appeals [*or*, *other court*].

II. That on the        day of        , 18    , at the request of the defendant, the plaintiff executed an undertaking, a copy of which is hereto annexed, or whereby he undertook [*reciting the obligation*].

III. That on the        day of        , by the said [*appellate*] court, the said judgment was affirmed, with        dollars costs and damages.

IV. That on the        day of        , 18    , the plaintiff paid        dollars upon the said undertaking, to the said M. N. No part of the same has been repaid to him.

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(*y*) The defendant's legal liability to pay the debt which plaintiff has paid, is an essential fact in an action to recover the money paid, unless there be an express promise by defendant to repay the plaintiff. 2 *Greenl. on Ev.*, 103, § 114, n.

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 Complaints by Sureties for Money Paid.
 

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*225. By Surety against Principal, for Debt for Goods sold and Costs of Judgment thereon, paid by Surety.*

I. That on the       day of       , 18       , at       , the plaintiff, at the request of the defendant, bought of one M. N., to be by him delivered to the defendant and to his use, certain goods, viz.:       of the value of       dollars, which were thereafter delivered to the defendant, but he failed to pay for them.

II. That on the       day of       , 18       , in an action brought to recover from the plaintiff the price of said goods, said M. N. recovered judgment, which was duly given (z) by the Court of       county against the plaintiff, then defendant, for the sum of       dollars, being the amount of said price, with interest and costs.

III. That the plaintiff was compelled to pay on the day of       , 18       , at       , and did pay to said M. N. the sum of       dollars, being the amount of the said judgment (a) and interest thereon; and that no part of the same has been repaid to him.

*226. By One of two Joint Makers of a Note, having paid it, against the Other, for Contribution.*

I. That on the       day of       , 18       , at       , this plaintiff and the defendant made and delivered to one M. N., their joint [*or*, joint and several] promissory note, in writing, of which the following is a copy: [*or*, whereby, &c., as in Form 220].

II. That at the maturity of said note the plaintiff was compelled (b) to pay and did pay the same; and no part thereof has been repaid to him. (c)

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(z) This is sufficient even if the judgment was in an inferior court. *Code*, § 161.

(a) It is not settled in what cases the surety may recover costs paid by him in defending himself. His right against the principal seems less doubtful than that against a co-surety. See 1 *Parsons on Cont.*, 33, note f; *Par-*

*sons' Merc. L.*, 39; *Baker v. Martin*, 3 *Barb.*, 642. In this State his right is established by statute. *Laws of 1858*, 506, ch. 314, § 3.

(b) The payment must be compulsory to entitle the payer to contribution; but this does not mean that there must be a suit, but only a fixed and positive obligation. 1 *Parsons on Cont.*, 33

## Demand before Suit.

III. MONEY RECEIVED. (*d*)227. *Common Form.* (*e*)

I. That on the                      day of                      , 18                      , at                      [or, at sundry times between the                      day of                      , and the                      day of                      , at                      ], the defendant received from one M. N. [or, received from the plaintiff, and as his agent, or, otherwise] the sum of                      dollars, to the use of the plaintiff.

II. That thereafter, and before this action, the plaintiff demanded payment thereof from the defendant. (*f*)

Peck v. Ingersoll, 7 N. Y. (3 Seld.), 528.

(*c*) This form is supported by Van Demark v. Van Demark, 13 How. Pr., 372.

(*d*) In an action for tortious taking and sale of personal property, the complaint may be simply for the money received, or for goods sold. The plaintiff may waive the tort, and his pleading need not show how the money came to defendant's hands. Harpending v. Shoemaker, 37 Barb., 270. Compare Byxhie v. Wood, 24 N. Y., 607.

A claim to rents and profits of real estate, turning on a question of title, cannot be recovered in an action alleging merely money received. Carpenter v. Stilwell, 3 Abbotts' Pr., 459.

(*e*) This form is supported by Betts v. Bache, 14 Abbotts' Pr., 279; Second Avenue R. R. Co. v. Coleman, 24 Barb., 300. It is sufficiently definite and certain. The defendant, if he wishes more, must seek a bill of particulars. Sloman v. Schmidt, 8 Abbotts' Pr., 5.

(*f*) Where defendant, having received money to the use of another, is rightfully in possession, a demand must be alleged in the complaint. Reina v. Cross, 6 Cal., 29.

According to the usual course of business, and in the absence of any special agreement, a banker cannot be sued for money until after the customer has

drawn for it, or in some way required its repayment. Downes v. Phoenix Bank, 6 Hill, 297.

An action against a stakeholder, to recover money deposited on an illegal wager, may be maintained without previous demand, when the money has been paid over before the action. Ruckman v. Pitcher, 1 N. Y. (1 Comst.), 392. In such an action interest is recoverable from the time of demand,—*e. g.*, from the commencement of the action. Ruckman v. Pitcher, 20 N. Y., 9; and 13 Barb., 556.

A person, not an attorney, who collects a note at the request of another, is liable for the amount, after a reasonable time, without demand. Hickok v. Hickok, 12 Barb., 632.

In general, an attorney is not liable to an action for moneys collected until after a demand or instructions to remit. Beardsley v. Root, 11 Johns., 464; Stafford v. Richardson, 15 Wend., 302; Taylor v. Bates, 5 Cow., 376; Rathbun v. Ingalls, 7 Wend., 320; Walradt v. Maynard, 3 Barb., 584. But he may waive the right to a demand. And where an attorney in correspondence with his client, denied his liability, and set up a claim against his client to a larger amount,—*Held*, this was a waiver of a demand. Walradt v. Maynard, *supra*; and see Satterlee v. Frazer, 2 Sandf., 141.

## Complaints for Money Received.

III. That he has not paid any part thereof [except the sum of        dollars]. (g)

228. *Against Agent, for Money collected. (h)*

I. That before the dates hereinafter mentioned, the plaintiffs authorized the defendant, as their agent, to collect and receive [premiums on policies of insurance, policy fees], and other moneys for them, for the purpose of remitting and paying over the same to them when collected.

II. That said defendant, as such agent, at or about the dates mentioned in the schedule hereto annexed, marked "A," received, collected, or was otherwise possessed of the several sums of money respectively set opposite said dates, (i) which sums amounted in the aggregate, on the        day of       , 18       , to the sum of        dollars.

III. That after deducting all credits due the defendant, there still remains due and owing to these plaintiffs, from said defendant, the sum of        dollars.

IV. That plaintiffs have, since the same became due and payable, demanded payment thereof from him, but the defendant refuses to pay over the same.

Attorneys practising as partners may both be sued for money collected, although it was paid to one of them, and has been demanded from him only. *McFarland v. Crary*, 6 *Wend.*, 297; affirming *S. C.*, 8 *Cow.*, 253. Compare *Ayrault v. Chamberlain*, 26 *Barb.*, 83.

(g) The implied promise to pay is a fiction which need not be alleged. *Byx-bie v. Wood*, 24 *N. Y.*, 607.

(h) In an action by a corporation, to recover funds received by the defendant as their treasurer, if the complaint shows the relation of the parties, and alleges as a matter of fact that defendant is indebted, giving a statement of the items of moneys received by him, this is equivalent, on demurrer, to al-

leging that all that is essential to make him indebted has been done, and consequently that a demand has been made. In such a case the summons is a sufficient demand; and if none were made, the defendant should pay the debt, but not the costs. *Second Avenue R. R. Co. v. Coleman*, 24 *Barb.*, 300.

(i) If the pleader prefers, this allegation may be more general, merely saying that defendant, as such agent, had collected from divers persons divers sums, either stating the aggregate or asking an accounting; and a bill of particulars can be obtained only by an order. *West v. Brewster*, 1 *Duer*, 647; *S. C.*, 11 *N. Y. Leg. Obs.*, 157.



For Money Received.

Short Forms.

229. *To recover back a Wager.*

I. That on the       day of       , 18       , at       , the plaintiff and one M. N. entered into a wager, depending on the result of the general election in this State in that year, which was then to take place [*or*, upon the event of a horse-race then about to take place].

II. That while the event upon which said wager was made was still contingent [*or*, unknown, *or*, *both*], the plaintiff deposited in the hands of the defendant, as stakeholder, the sum of       , to abide the event of such wager, whereby an action accrued to the plaintiff, according to the provisions of the Statute of Betting and Gaming. (*j*)

230. *Short Form, for Money received contrary to Statute. (k)*

That defendant is [*or*, where he is sued as executor or administrator, the defendant's testator was, *or*, intestate was, before his death] indebted to the plaintiff in the sum of       dollars [*the sum received, or, value of goods received*], whereby an action accrued to the plaintiff, according to the provisions of the statute regulating the interest on money [*or*, against betting and gaming, *or otherwise stating its subject*].

231. *For Money Overpaid by Mistake.*

I. That heretofore the parties having had frequent dealings with each other, the defendant, on or about the       day of       , at       , rendered their account to the plaintiff, which account set forth an indebtedness of the plaintiff to the defendant in the sum of       dollars.

(*j*) This form is supported by *O'Maley v. Reese*, 6 *Barb.*, 658. Where the wager is void at common law only, add averment of demand, in the place of the reference to the statute.

(*k*) This is the short form which was authorized by 2 *Rev. Stat.*, 351, in actions of debt to recover any thing received contrary to any statute. See,

also, *O'Maley v. Reese*, 6 *Barb.*, 658; *Collins v. Ragrew*, 15 *Johns.*, 5; *Cole v. Smith*, 4 *Id.*, 193. This form is deemed sufficient under the Code. *Betts v. Bache*, 14 *Abbotts' Pr.*, 279; *S. C.*, 23 *How. Pr.*, 197; *People v. Bennett*, 5 *Id.*, 384. Though it may be obnoxious to a motion to make more definite and certain in some cases.

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 Complaint for Money Advanced.
 

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II. That the plaintiff, supposing said account to be correctly stated, paid to the defendant said amount. (*l*)

III. That the account was not correctly stated, but that it overcharged (*m*) the plaintiff with the sum of            dollars, for [*specifying the error*]. (*n*)

232. *For Repayment of Advances on a Contract for Services, unfulfilled.*

I. That on the            day of           , 18   , at           , the plaintiff entered into an agreement with the defendant, whereby the defendant undertook to render his services to the plaintiff as           , for the term of           , in consideration of the sum of            dollars, to be paid therefor by the plaintiff.

II. That on the            day of           , 18   , at           , the plaintiff paid to the defendant, on account of his services to be rendered thereafter in pursuance of said agreement, the sum of            dollars.

III. That the defendant wholly neglected and refused to render said services, (*o*) although this plaintiff has been ready to receive and to pay for the same, (*p*) and that no part of said sum has been repaid to the plaintiff.

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(*l*) It has been held, that under a complaint alleging that the plaintiff settled an account by paying in money the whole amount claimed to be due, and claiming to recover a sum which he overpaid in consequence of an overcharge in the account, the plaintiff cannot recover on proving that he settled the account by an order for delivery of stock. *Mann v. Moorewood*, 5 *Sandf.*, 559. But this would probably now be regarded as a mere variance, unless defendant was prejudiced by it.

(*m*) If the complaint states fraudulent representations of the defendant, by which the plaintiff was induced to pay him the money, which he seeks to recover back, this does not necessarily stamp the action as one in tort, or show that the cause of action is not assignable. *Byxbie v. Wood*, 24 *N. Y.*, 607.

(*n*) A demand is not necessary before suit for money paid by mistake. The party receiving money paid under a mistake of facts is not a bailee or trustee, nor does his duty to return it arise upon request. *Utica Bank v. Van Giesen*, 18 *Johns.*, 485.

Upon the same principle it seems unnecessary to aver that it has not been repaid. The plaintiff is not bound to prove this negative; and the rule that a breach must be alleged does not apply.

(*o*) The plaintiff must prove the non-performance. *Wheeler v. Board*, 12 *Johns.*, 363.

(*p*) Where an agreement on which money has been advanced has been rescinded by the defendant, or performance so neglected as to entitle the plaintiff to rescind it, a demand of repayment is not necessary to enable the plaintiff to recover back the money

## For Money Paid.

233. *For Repayment of Deposit on a Contract for the Purchase of Real Estate, unfulfilled. (q)*

I. That on the            day of           , 18   , the said defendants and this plaintiff entered into a contract in writing, subscribed by the defendants, whereby it was mutually agreed that the said defendants should sell to this plaintiff certain leasehold premises known as           , in           , for the sum of            dollars, to be paid therefor by this plaintiff; that the defendants should make a good title to the said premises, and deliver a deed thereof on the            day of           , 18   ; and that the plaintiff should thereupon pay to the said defendants the said sum. (r)

II. That the plaintiff, as a security, as well for the performance of said agreement on his part, as to secure a performance thereof on the part of the said defendants, then and there deposited in the hands of said defendants the sum of            dollars as a part of the said purchase-money, to be to and for the use of the defendants, and to be retained by them on account of the purchase-money, if the plaintiff should complete his purchase and receive the deed; but to be to and for the use of this plaintiff, and to be returned to him, if the defendants should fail to fulfil their agreement, and give a deed at the time and pursuant to the agreement.

III. That he has always been ready and willing to do and

paid. *Raymond v. Bearnard*, 12 *Johns.*, 274; and see *Utica Bank v. Van Giesen*, 18 *Id.*, 485. If the defendant has rescinded, plaintiff need not prove readiness to pay the whole contract price. *Main v. King*, 8 *Barb.*, 535.

(q) Where a sale is by auction, the auctioneer holding the deposit is a stakeholder, and upon a failure of the vendor to complete the contract,—*e. g.*, on failure of title,—is always bound to repay the purchaser. See *Lee v. Munn*, 1 *Moore*, 481; *Curling v. Shuttleworth*, 6 *Bing.*, 121; *Berry v. Young*, 2 *Esp.*, 641; *Babbington on Auctions*, 173.

And if he failed to disclose his principal, he is liable individually in an

action for damages for non-performance of the contract as well as for repayment of the deposit. *Hanson v. Robordeau*, *Peake's N. P. C.*, 120. See *Kent's Com.*, 630, 631; *Mauri v. Hefferman*, 13 *Johns.*, 58; *Bank of Rochester v. Monteath*, 1 *Den.*, 402; *Mills v. Hunt*, 20 *Wend.*, 431; affirming *S. C.*, 17 *Id.*, 333.

(r) Such an agreement is mutual, and the covenants are dependent on each other. *Green v. Reynolds*, 2 *Johns.*, 207; *Jones v. Gardiner*, 10 *Id.*, 266; *Gazley v. Price*, 16 *Id.*, 267; *Hardin v. Kretsinger*, 17 *Id.*, 293; *Parker v. Parmele*, 20 *Id.*, 130; *Morris v. Sliter*, 1 *Den.*, 59.

## Averment of Performance of Purchaser's Contract.

perform every thing in the agreement contained on his part, and on the said            day of           , 18   , was ready and willing, and duly offered to the defendants, to accept and take the deed of the premises pursuant to the agreement, and to pay to them the balance of the purchase-money due therefor. (s)

[Or, III. That the plaintiff duly performed all the conditions of said contract on his part.] (t)

IV, That the defendants did not on said            day of           , nor have they at any other time whatsoever, given him a deed of the premises pursuant to the agreement, but refused to do so [or, but have wholly failed so to do, although the plaintiff waited a reasonable time, to wit,            days after said           , and then offered to receive a deed]. (u)

(s) It is necessary for the plaintiff to aver that he was ready and willing to fulfil at the time and place appointed, whether the other party was ready or not. *Porter v. Rose*, 12 *Johns.*, 209, and cases there cited.

Where the covenants are dependent, the purchaser is not bound to make an absolute tender of performance. An offer to perform, conditioned on the defendant's performing, is sufficient. *Robb v. Montgomery*, 20 *Johns.*, 15; *West v. Emmons*, 5 *Id.*, 179; *Topping v. Root*, 5 *Cow.*, 404; *Rawson v. Johnson*, 1 *Eust.*, 203; *Watterhouse v. Skinner*, 2 *Bos. & P.*, 447; and see *Miller v. Drake*, 1 *Cai.*, 45; *Bellinger v. Kitts*, 6 *Barb.*, 273; and cases *supra*.

But an offer to perform is necessary. An averment of mere readiness is insufficient. *Lester v. Jewett*, 11 *N. Y.* (1 *Kern.*), 453; affirming *S. C.*, 12 *Barb.*, 502, 505; *Williams v. Healy*, 3 *Den.*, 363; *Johnson v. Wygant*, 11 *Wend.*, 48; and see cases *supra*.

(t) This form of averment is authorized by the *Code*, § 162.

(u) Upon failure by the vendor to be ready with the deed, and convey a good title on the day specified, the vendee may rescind the contract and recover back the deposit. 11 *Johns.*, 525, 527; *Benedict v. Lynch*, 1 *Johns. Ch.*, 370;

*Dominick v. Michael*, 4 *Sandf.*, 374, 426; *Cornish v. Rowley*, 1 *Selv. N. P.*, 179; *Van Benthuysen v. Crapser*, 8 *Johns.*, 257. See, also, *Sugd. on Vend.*, 359. And a demand of the deposit is a rescission. *Dominick v. Michael*, 4 *Sandf.*, 426. Many of the cases hold that between vendor and purchaser a mere demand of a conveyance is not enough; the purchaser must wait a reasonable time for its preparation and execution, and then offer to receive it. The bringing of the action is not a sufficient demand. *Faller v. Hubbard*, 6 *Cow.*, 13; *Hackett v. Huson*, 3 *Wend.*, 249; *Connelly v. Pierce*, 7 *Id.*, 128; *Footte v. West*, 1 *Den.*, 544; *Lutweller v. Linnell*, 12 *Barb.*, 512. To the contrary are *Carpenter v. Brown*, 6 *Id.*, 147; *Flynn v. McKeon*, 6 *Duer*, 203; *Driggs v. Dwight*, 17 *Wend.*, 71, where it was held, that where the right to a deed is perfect, if any request can be deemed necessary, one is enough to put him in default, and the purchaser is not, in general, bound to prepare a deed and demand its execution; though it may be proper in peculiar circumstances,—*e. g.*, where the day is not fixed.

In *Blood v. Goodrich*, 9 *Wend.*, 68, it was held that if, on demand, the vendor positively refuses, the purchaser

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For Money Collected on Collateral Securities.

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V. And the plaintiff further states, that on the       day of       , 18       , he demanded (v) of the said defendants that they pay to him the sum of       dollars he had deposited with them ; but that no part of the same has been paid.

234. *By Pledgor of a Note as Collateral, against the Pledgee, the Note having since been collected by him ;—to recover its Excess over the Amount of the Debt.*

I. That on the       day of       , 18       , the plaintiff being then indebted to the defendant in the sum of       dollars, he delivered [or, indorsed, *if the note was transferred by indorsement*] to said defendant, as a collateral security for the payment of the same, a promissory note made by one M. N. for       , bearing date on the       day of       , 18       , and payable at       months after its date.

II. That at its maturity the note was collected by the defendant, and by the application of the moneys so received by him, said indebtedness was wholly paid and extinguished.

III. That after payment of said indebtedness there remained in the hands of the defendant a balance of       dollars, belonging to this plaintiff; payment of which the plaintiff demanded of the defendant on the       day of       , 18       , but no part thereof has been paid.

235. *By Assignees of a Debtor, against his Pledgees of a Mortgage as Collateral to Notes on which he was jointly liable, the Mortgage having since been collected by the Pledgees ;—to recover its Excess over the Amount of the Notes, and to have the Notes delivered up. (w)*

need not make another demand ; and where several persons are bound to convey, and one, upon demand, refuses, a demand of the others is unnecessary.

(v) The plaintiff is entitled to recover interest on the deposit from the time of his demand for repayment. *Farquhar v. Farley*, 7 *Taunt.*, 592. He may also recover as damages for the defendant's breach of contract, expenses of examination of title (see *Jones v. Lit-*

*tledale*, 6 *Ad. & El.*, 486 ; *Hodges v. Littlefield*, 1 *Bing.*, 492), and interest on money belonging to the plaintiff and kept by him lying idle, ready to complete the purchase. *Sherry v. Oke*, 3 *Dowl. Pr. C.*, 349. But such damages must be specially pleaded.

(w) This is, in substance, the complaint in *Cahorn v. Bank of Utica*, 7 *N. Y.* (3 *Seld.*), 486. It states but a single cause of action.

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Complaint by Debtor against Creditor.

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I. That, as they are informed and believe, on or about the day of , 18 , S. W. B. [*plaintiff's assignor*] assigned and delivered to the defendants a bond and mortgage executed by one B. P. C., bearing date , on which there was due, or to become due, and unpaid, the sum of , besides interest thereon, to be held by the said defendants as collateral security for the payment of certain moneys due them from said S. W. B., as specified in a receipt for the same, then delivered by said defendants to the said S. W. B., of which the following is a copy: [*setting it out*]. (x)

II. That, as they are informed and believe, the notes of said B. & R., mentioned and referred to in said receipt, were as follows [*describing them*]: and that there were no other notes of said B. or of B. & R., indorsed by said C., then in said bank; nor has there been since any other such notes as the notes described in said receipt, except the three notes above specified.

III. That on the day of , 18 , the said S. W. B., by an instrument in writing, under his hand and seal, assigned and transferred to the plaintiffs all his goods, chattels, demands, property, and personal estate of every name and nature.

IV. That shortly afterwards, and before the payment to the defendants of either the said notes or the said mortgage, S. W. B. died, and that no executors or administrators have been appointed upon his estate.

V. That, as they are informed and believe, on or about the day of , 18 , the full amount of said bond and mortgage due, or to become due thereon, with interest, was paid to the defendants; that the said bond and mortgage were given up and cancelled, and that thereupon, by the application of the moneys secured in said mortgage and so paid to the defendants, the said notes were fully paid and satisfied. That the amount so paid on the bond and mortgage was greater than the whole amount due and secured by the said notes; so that there remained a balance, after paying and satisfying said notes, of about dollars; by which means the plaintiffs became entitled to the possession of said notes, and to have the

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(x) A better mode of pleading the debt would be to describe the notes very concisely, without setting out the receipt.

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For Money Collected on Collateral Securities;—On Judgment.

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balance of said moneys paid over to them as the assignees of said S. W. B.

VI. That on the                      day of                      , 18                      , the plaintiffs requested the defendants to account for and pay over to them the balance aforesaid, after deducting the amount due on said notes, and to deliver to them the said notes; (y) but the said defendants have not done so.

VII. That the said bond and mortgage was the sole and individual property of said S.W.B., and that the notes of B. & R. were and are due from a mercantile firm which formerly existed, composed of said S. W. B., and one W. R., who has since died, to be paid by them equally, and that the said notes are now the property of and belong to the plaintiffs as such assignees.

Wherefore the plaintiffs demand judgment against the defendants for                      dollars, with interest from                      ; and that the defendants be required to deliver to the plaintiffs the notes for the payment of which said bond and mortgage were hypothecated.

236. *For Repayment of a Judgment paid and afterwards reversed.* (z)

I. That on or about the                      day of                      , 18                      , the defendant recovered judgment duly given against this plaintiff in the                      Court, in and for the county of                      , in an action wherein the defendant was plaintiff, and this plaintiff was defendant, for the sum of                      dollars.

II. That on the                      day of                      , 18                      , at                      , the plain-

(y) In an action against a creditor to compel him to convey, pursuant to his contract, lands conveyed to him to secure his debt, the complaint must allege his refusal to convey. Merely alleging a demand is not enough. *Dodge v. Clark*, 17 Cal., 586.

(z) The power of an appellate court to make restitution, under the Code, will usually afford a remedy which is preferable to an action.

Where A. sues to recover back money recovered from him on his arbitration-note, by C., to whom B. had transferred it, and upon the ground that the award was void, it is essential to aver that the note was transferred before it fell due, so as to show that the defence could not have been set up in the suit by C. *Battey v. Button*, 13 Johns., 187.

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Complaint for Money Paid under Duress.

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tiff was compelled to pay, and did pay to the defendant the sum of            in satisfaction thereof.

III. That afterwards on the            day of           , 18   , by the judgment of said court [*or, other appellate court*] said first-mentioned judgment was duly reversed; (a) but that no part of the sum paid in satisfaction thereof has been repaid to this plaintiff.

*237. By Owner of Goods against Common Carrier, to Recover Back Excess of Freight exacted.*

I. That on the            day of           , 18   , the defendants agreed with this plaintiff to transport from            to           , and to deliver there to him certain goods of the plaintiff, for the sum of            dollars [*or, for a reasonable sum*].

[*Or, where there was no special contract*, I. That the defendants being common carriers for hire between            and           , on the            day of           , 18   , undertook to transport for the plaintiff from            to            certain goods of his, for a reasonable compensation.]

II. That in pursuance thereof the defendants transported said goods [for which service            dollars is a reasonable sum]; and upon their arrival at           , the plaintiff demanded said goods of the defendants, and offered to pay them, for transporting the same, said sum of            dollars; but that the defendants refused to deliver said goods, unless the plaintiff would pay to the defendants the sum of            dollars for transporting the same.

III. That the plaintiff thereby was compelled to pay, and on the            day of           , 18   , and to obtain the delivery of said goods, did pay to the defendants the said sum of            dollars which sum he paid under protest, and expressly denying the defendants' right to claim it. (b)

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(a) It is not enough to show that the judgment was erroneous. It must have been reversed. *Walker v. Ames*, 2 *Cov.*, 428; *White v. Ward*, 9 *Johns.*, 232 and see *Roth v. Schloss*, 6 *Barb.*, 308.

But the fact that a new trial is ordered does not suspend the right to recover back the payment. *Sturges v. Allis*, 10 *Wend.*, 355.

(b) This form is based on *Harmon v. Bingham*, 1 *Duer*, 209.



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 For Money Received.
 

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238. *Against a Factor, for Price received by him for Goods sold.*

I. That on the            day of           , 18   , at           , the plaintiff employed the defendant to sell upon commission [*here designate the goods*], the property of the plaintiff, and thereupon delivered the same to him for that purpose.

II. The plaintiff further states, upon information and belief, that thereafter, and before the            day of           , 18   , but on what particular day or days he is not informed, the defendant sold said goods for the sum of            dollars, which sum he thereupon received. (c)

III. That, as this plaintiff is informed and believes, the just charges of the defendants for the commissions and expenses therein, amount to            dollars, and no more. (d)

IV. That on the            day of           , 18   , the plaintiff demanded of the defendant payment of the balance of said price remaining after deducting said charges; but that no part of the same has been paid. (e)

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(c) If the declaration in an action to recover the price of goods sent for sale on commission, alleges that defendant sold, but did not account to plaintiff, the plaintiff must prove that a sale actually took place. *Elbourne v. Upjohn*, 1 C. & P., 572; S. C., 11 Eng. Com. L. R., 476. If defendant has accounted, it will be better to sue on the account stated.

Under a covenant to sell land, using diligence to do so to the best advantage, and pay over the proceeds, assigning as a breach that the defendant did not pay over the proceeds of the sale, is bad on special demurrer. There must be a direct averment of a sale and the receipt of money. *Brown v. Stebins*, 4 Hill, 154.

(d) This allegation is not essential, but may prevent any answer setting up his claim.

(e) In an action against a factor for the proceeds of goods sold, of which he

apprised his principal, a demand must be shown, unless he had instructions to remit, or the usage of his business made it his duty to do so without instructions. The action is founded on a supposed breach of trust which must be made out affirmatively. *Cooley v. Betts*, 24 Wend., 203; *Ferris v. Paris*, 10 Johns., 285; *Brink v. Dolsen*, 8 Barb., 337; *Halden v. Crafts*, 4 E. D. Smith, 490; S. C., *sub nom.* *Walden v. Crafts*, 2 Abbotts' Pr., 301; *Baird v. Walker*, 12 Barb., 298.

As to the distinction, in respect to the necessity of proving a demand, between an action for not accounting, and an action for not paying over, see *Cooley v. Betts*, 24 Wend., 203.

In an action against an agent for not accounting, &c., a request to account and pay over must be alleged and proved. *Bushnell v. McCauley*, 7 Cal., 421.

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Complaints for Money Received.

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239. *Against Factor, under Del Credere Commission.*

I. That on the            day of           , 18   , the plaintiffs employed the defendants to sell certain goods and merchandise of the plaintiffs, of the value of            dollars, upon commission, and then delivered the same to them; and the defendant then promised to sell the same, and to be responsible to the plaintiffs for the price thereof.

II. That as the plaintiffs are informed and believe, thereafter and on or before the            day of           , 18   , but on what particular day or days they are not informed, and cannot state, the defendants sold said goods and merchandise for the sum of            dollars, on a credit of            months from the time of such sale; which credit expired before the commencement of this action. (*f*)

III. [*As in Form 238.*]

IV. The plaintiffs further state on information and belief, that the sum of            dollars, being the price of said goods and merchandise after deducting said charges, became due and payable to these plaintiffs from the defendants on the            day of           , 18   .

V. That on the            day of           , 18   , at           , the plaintiffs demanded (*g*) payment of the same from the defendants, but that no part of the same has been paid.

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(*f*) Where the defendants sold under a *del credere* commission, it is unnecessary for the complaint to aver that the purchaser was in default; and if he was in default it is not necessary to aver a demand on him, though it might be otherwise if the factors merely guaranteed the payment of a price, to be collected by the principal. *Milliken v. Byerly*, 6 *How. Pr.*, 214; and see *Wolff v. Koppel*, 2 *Den.*, 268; 1 *Parsons on Cont.*, 78.

(*g*) The rule is settled in this State that a foreign factor is not liable to an action for the proceeds of sales made by him for account of his principal on commission until a demand made by

the principal, or instructions to remit; except, perhaps, where it is shown that it was according to the usual course of dealing to remit without demand. *Walden v. Crafts*, 2 *Abbotts' Pr.*, 301; *S. C.*, *sub nom. Halden v. Crafts*, 4 *E. D. Smith*, 490; *Ferris v. Paris*, 10 *Johns.*, 285; *Murray v. Coster*, 20 *Id.*, 576; *Leverick v. Meigs*, 1 *Cov.*, 645; *Taylor v. Bates*, 5 *Id.*, 376; as explained by *Lyle v. Murray*, 4 *Sandf.*, 590, 594; *Cooley v. Betts*, 24 *Wend.*, 203; *Hays v. Stone*, 7 *Hill*, 128; *Baird v. Walker*, 12 *Barb.*, 298; and see *Lillie v. Hoyt*, 5 *Hill*, 395; and *Heubach v. Rother*, 2 *Duer*, 227, 252; *S. C.*, *N. Y. Leg. Obs.* 269.

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 For Money Received.
 

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240. *Against Note-broker, for Proceeds of Note discounted.* (h)

I. That on the            day of           , 18   , at           , the plaintiff employed the defendant to sell or procure to be discounted a promissory note, the property of the plaintiff, made by one M. N. [*here describe the note*], and thereupon the plaintiff delivered the same to the defendant, who undertook to sell it or procure it to be discounted for a reasonable commission, and to pay the proceeds over to the plaintiff.

II. The plaintiff further states, on information and belief, that on the            day of           , 18    [*or, thereafter and before the            day of           , 18*, but on what particular day he is not informed], the defendant procured said note to be discounted by one O. P., and received as the proceeds thereof the sum of            dollars.

III. [*As in Form 238.*]

IV. That the plaintiff, on the            day of           , 18   , at           , duly demanded from the defendant payment of the sum of            dollars, being the balance of the proceeds after deducting his commission, but no part thereof has been paid.

241. *By an Assignee, to recover Official Fees received by One who had usurped the Assignor's Office.* (i)

I. That prior to the            day of           , 18   , the defendant was in possession of, and claimed to hold and administer the office of [chamberlain of the city and county of New York].

II. That on or about that day, by            and at           , under and in pursuance of the laws of this State, N. C. P. was duly appointed to fill the said office, and was constituted thereby [the chamberlain of the city and county of New York] in place

(h) In an action against brokers for selling, without authority, stock which they had purchased for the plaintiff, if the complaint shows that they purchased the stock for the plaintiff, to be delivered to him at his option within a specified time, but sold it meanwhile against his express instructions, it need not allege a demand and tender on the

part of the plaintiff. An allegation that defendants sold it may be deemed, on demurrer, to imply that they had perfected the sale by delivery. *Clark v. Meigs*, 13 *Abbotts' Pr.*, 467; S. C., 22 *How. Pr.*, 340; reversing S. C., 12 *Abbotts' Pr.*, 267, and 21 *How. Pr.*, 187.

(i) This form is from *Platt v. Stout*, 14 *Abbotts' Pr.*, 178.

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Complaint to Recover Fees Received.

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of the defendant; and N. C. P. thereupon duly made and executed the official bond with the sureties, and took the oath of office required by law of persons who are appointed to hold the same; that said bond was duly approved by , and the same, with the said oath, were duly filed in the office of ; and after that date, and until on and after the day of , 18 , was entitled to hold and administer said office, and to receive the fees, emoluments, and commissions appertaining thereto.

III. That N. C. P. thereupon gave due notice to the defendant of the foregoing matters, and demanded that defendant relinquish the office to him, and deliver to him the books and papers belonging to the same, all which the defendant refused to do; and he wrongfully and unlawfully usurped and continued to exercise and perform the duties of said office, and to receive the emoluments, fees, and commissions thereof, until on and after the 7th day of June, 1860.

IV. The plaintiff further alleges, upon information and belief, that between the day of , 18 , and the day of , 18 , the defendant, so unlawfully exercising and performing the duties of said office, collected and received, under color thereof, the sum of dollars for State taxes, collected in the city and county of New York, which taxes the chamberlain of the city and county of New York was empowered and required by law to receive and pay over forthwith to the treasurer of the State of New York, and to demand and receive therefor the commission and fee of one per cent. on every dollar which he should so receive and pay; that on or about the day of , 18 , the defendant paid over to the treasurer of the State of New York the sum of dollars (part of said sum of dollars), and retained and appropriated to his own use the balance thereof, to wit, dollars as and for the official commissions and fees thereupon, which rightfully belonged to the said N. C. P.

V. That N. C. P., before the commencement of this action, duly assigned to this plaintiff his claim, demand, and cause of action therefor against the defendant; and that the defendant has not paid the same nor any part thereof.

## On Sale of Goods.

## SECTION III.

## COMPLAINTS IN ACTIONS FOR GOODS SOLD. (a)

## SELLER AGAINST BUYER.

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## SELLER AGAINST BUYER.

242. *Sale and Delivery.* (b)

I. That on the                      day of                      , 18                      , at                      , the plaintiff sold and delivered to the defendant, (c) \* [*here designate the articles,—e. g., crockery, gas fixtures, and glassware*].

II. That the same were reasonably worth                      dollars. (d)

III. That no part of the same has been paid [except, &c.] (e)

(a) The complaints here given are merely in actions to recover price. For *Dowl. & L.*, 986; *S. C.*, 12 *M. & W.*, 760.

complaints in actions for damages for breach of contracts of sale, see *infra*.

(b) An auctioneer or a factor who in his own name sells goods for another, is the "trustee of an express trust," and as such may sue on the contract of sale. *Bogart v. O'Regan*, 1 *E. D. Smith*, 590; *Grinnell v. Schmidt*, 2 *Sandf.*, 706.

(c) An averment of request is not necessary. *Acome v. American Mineral Co.*, 11 *How. Pr.*, 24; *Glenny v. Hit-chins*, 4 *Id.*, 98; *Victors v. Davis*, 1

(d) The allegation of value is material. *Gregory v. Wright*, 11 *Abbotts' Pr.*, 417.

(e) An implied promise to pay is matter of law, and should not be pleaded. *Farron v. Sherwood*, 17 *N. Y.*, 227. The next form is appropriate to the case of an express promise. For averment of demand also, see next form.

Upon a state of facts in which a demand would be necessary if the plaintiff sued for damages for conver-

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 Complaint on Account, for Goods Sold.
 

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243. *The Same, where the Price was Agreed on.*

I. [As in preceding form.]

II. That the defendant then promised to pay therefor the sum of        dollars [if a credit was given, add, on the day of       , 18    ].

III. That on the        day of       , the plaintiff demanded of the defendant payment of said sum. (f)

IV. That no part thereof has been paid [except the sum of        ].

244. *Short Form, Upon an Account. (g)*

I. That on the        day of       , 18    [or, between two days, naming them], the defendant was indebted to the plaintiff in the sum of        dollars, on an account for goods sold (h) and delivered by the plaintiff to the defendant at       .

II. That the same became payable on the        day of       , but no part thereof has been paid [except the sum of        ].

sion, it is equally necessary where he sues upon the implied contract, waiving the tort. *Spoor v. Newell*, 3 *Hill*, 307.

(f) No demand is necessary to make out the cause of action. Bringing the action is a sufficient demand. A contract to pay, generally, and without time or terms specified, creates a debt payable presently, and no previous call or demand of payment is required. *Lake Ontario, &c., R. R. Co. v. Mason*, 16 *N. Y.*, 451.

On an agreement to pay on request, though no request is necessary if the promisor be the principal debtor, it is necessary if he is a surety. *Nelson v. Bostwick*, 5 *Hill*, 37; *Douglass v. Rathbone, Id.*, 143; see, also, *Gibbs v. Southam*, 5 *Barn. & Ad.*, 911; *Radford v. Smith*, 3 *M. & W.*, 258.

The object of averring a demand is simply to carry interest. Where goods are purchased at a price fixed by the

parties, and without fixing any term of credit, the debt is liquidated when contracted, and if, after reasonable time elapses, the account is presented, and impliedly admitted, the defendants are in default for withholding payment, and interest is properly chargeable from the time of the demand. *Beers v. Reynolds*, 11 *N. Y.* (1 *Kern.*), 97; affirming *S. C.*, 12 *Barb.*, 288.

(g) This form is supported by *Allen v. Patterson*, 7 *N. Y.* (3 *Seld.*), 476; *Tucker v. Rushton*, 2 *Code R.*, 59; *Adams v. Holley*, 12 *How. Pr.*, 326; *Cudlipp v. Whipple*, 4 *Duer*, 610; *S. C.*, 1 *Abbotts' Pr.*, 106; *Graham v. Camman*, 5 *Duer*, 697; *Dows v. Hotchkiss*, 10 *N. Y. Leg. Obs.*, 281; *Chamberlin v. Kaylor*, 2 *El. D. Smith*, 134; see *ante*, 163, Form 214, note.

As to when separate accounts between the same parties are separate causes of action, and therefore must be separately stated, see *Phillips v. Berick*,

## For Goods Sold.

245. *Sale to Defendant, and Delivery to a Third Person. (i)*

That on the            day of           , 18   , at           , the plaintiff bargained and sold to the defendant, and delivered to one M. N., at the request of the defendant [*continue as in preceding Form 242, from the \**].

246. *Sale and Delivery, Anticipating and Avoiding Defence (j) of Payment.*

[*Allege sale, as in preceding forms.*]

III. That on the            day of           , 18   , at           , the defendant passed to this plaintiff, as in payment of his indebtedness for said goods, the check of one M. N. upon the Bank of

16 *Johns.*, 136; *Stevens v. Lockwood*, 13 *Wend.*, 644; *Staples v. Goodrich*, 21 *Barb.*, 317; *Secor v. Sturgis*, 2 *Abbotts' Pr.*, 69; and *Longworthy v. Knapp*, 4 *Id.*, 115.

(h) A complaint, although it refers to an account, should indicate the nature and character of the claim, and the period within which it arose. *Farcy v. Lee*, 10 *Abbotts' Pr.*, 143.

(i) That person is liable to whom the creditor at the time gave the credit. *Storr v. Scott*, 6 *Carr. & P.*, 241; *Chit. on Contr.*, 226; *Story on Agency*, 213, § 263; *Smith's Merc. L.*, 212; *Dixon v. Frazee*, 1 *E. D. Smith*, 32; *Briggs v. Evans, Id.*, 192.

When goods sold are delivered to a third person for the exclusive use of such person, his authority to receive them, and their delivery to him, are material and issuable facts, which the plaintiff, in an action against the purchaser, is bound to prove upon the trial, and is therefore bound to aver in the complaint.

It is only as a conclusion of law that such a delivery amounts to the delivery to the purchaser. *Smith v. Leland*, 2

*Duer*, 497. But a variance in this respect may be disregarded if the defendant does not appear to have been misled. *Rogers v. Verona*, 1 *Bosw.*, 417; *Briggs v. Evans*, 1 *E. D. Smith*, 192.

(j) The pleader will do well to be cautious how he undertakes to anticipate and avoid in his complaint a probable defence; as his privilege to do so must be claimed rather from the indulgence of the court shown to the exigencies of the plaintiff's case, than from any distinct authority in the Code.

In pleading in equity the complainant was allowed to anticipate a defence by setting it up in the charging part of the bill as a pretence of the defendant, and averring matters in opposition to it. *Stafford v. Brown*, 4 *Paige*, 88. And this was the common practice. *Morrell v. Morrell*, 3 *Barb.*, 236; *Hetfield v. Newton*, 3 *Sandf. Ch.*, 564; *Harris v. Knickerbacker*, 5 *Wend.*, 638; see *Equity Rule 5 of 1847*. The complainant, however, was not bound to do so, even where the defence was the Statute of Limitations. *Radcliff v. Rowley*, 2 *Barb. Ch.*, 23.

Under the new practice his right to

## Complaints on Sale of Goods.

O. P., which check the defendant represented to this plaintiff to be good; but that on the contrary, said M. N. then had no funds at the said bank, and his said check was worthless, as the defendant then well knew [*or*, was worthless, and although the same was duly presented for payment on the       day of       , 18       , it has never been paid, of which the defendant had due notice]. (*k*)

do so is not settled. The plaintiff is not bound to anticipate a defence. *Van Demark v. Van Demark*, 13 *How. Pr.*, 372. But whether he is entitled to do so, the authorities are not agreed. Thus in *Butler v. Mason* (5 *Abbotts' Pr.*, 40), it was held that he could not properly allege matters only important by way of anticipating and avoiding a defence which it is wholly optional with the defendant to interpose in his answer, or to waive,—*e. g.*, the Statute of Limitations. And the same rule was applied in *Sands v. St. John*, 36 *Barb.*, 628; *S. C.*, 23 *How. Pr.*, 140. But in *Bracket v. Wilkinson* (13 *Id.*, 102), it was held, however, that he might do so;—*e. g.*, allege that he had been induced, by false representations, to receive in payment a worthless check. In *Wade v. Rusher* (4 *Bosw.*, 537), it was held that in an action where the setting aside of a release or account stated is necessary to reach the relief sought, the complaint may, after stating the original cause of action, set forth the defence which it is anticipated defendant will interpose, with statements which avoid the defence. So in *Thompson v. Minford* (11 *How. Pr.*, 273), it was held that plaintiff may amend his complaint, in a proper case, by adding allegations necessary to show securities or evidences of debt, taken for the cause of action set out in the original complaint,—*e. g.*, a foreign judgment recovered upon it. This is not adding a new count.

Upon either view a complaint alleging such facts should be regarded as

good upon demurrer. *Roth v. Palmer* 27 *Barb.*, 652; *Campbell v. Wright*, 21 *How. Pr.*, 9; *Atwill v. Le Roy*, 4 *Abbotts' Pr.*, 438.

It certainly seems to be no strained construction of the requirement to state in the complaint facts constituting a cause of action, to hold that in those cases, at least, where the defence is apparent on the face of the complaint (as in the case of the Statute of Limitations), or where special relief is necessary, averments necessary to meet it may be inserted. And the only remedy for the error, if any, in so doing, is by motion to strike out the anticipatory averments as irrelevant. This motion is addressed to the discretion of the court, in this respect, that if the irrelevant allegation which has crept into the pleading will not in any event do harm to the opposite party, the court is not bound to strike it out. *Martin v. Kanouse*, 2 *Abbotts' Pr.*, 330. The motion should be denied unless the defendant is aggrieved.

There is a certain sanction in this rule for an occasional departure from the systematic theory of pleading, where the real merits of the plaintiff's case require it; which must not, however, be trusted too far.

It is with reference to its use in these cases, and not as a theoretically approved mode of pleading, that Forms 246 and 247 are given.

(*k*) As to when the averment of demand and notice may be omitted, see notes to Complaints on CHECKS, Section XI, *infra*.



Goods Sold.

To Wife, for Separate Estate.

247. *The Same, Anticipating and Avoiding Defence of an Unexpired Credit. (l)*

I. [*Allege sale on credit, as in preceding forms.*]

II. That in order to induce the plaintiff to allow him credit upon such sale, the defendant then falsely and fraudulently represented himself to the plaintiff to be worth a large sum, to wit, \_\_\_\_\_, over and above all his just debts and liabilities; whereas, in truth, he was insolvent; and that the only credit given by the plaintiff to the defendant was solely induced by said false and fraudulent representations, and solely on the faith thereof. (m)

248. *Against Husband and Wife, for Goods sold for her Separate Estate.*

I. That between the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, and the day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, the plaintiff furnished to the defendant W. Z., who was then, and still is, the wife of the defendant Y. Z., (n) materials used for the building of a house

(l) Where goods are sold on a credit, and are to be paid for by a note or bill, and the buyer refuses to give the note or bill, the seller cannot sue as for goods sold and delivered, until the expiration of the credit; though he may sue immediately upon the refusal, for damages for the breach of the agreement to give the note. *Hanna v. Mills*, 21 *Wend.*, 90; *Yale v. Coddington*, 21 *Id.*, 175; *Corlies v. Gardner*, 2 *Hall*, 345; and see *Ward v. Begg*, 18 *Barb.*, 139.

But where goods are sold on a credit which the buyer fraudulently obtained, by false representations, the seller may reclaim the goods, or may bring trespass or trover (*Ash v. Putnam*, 1 *Hill*, 302; *Cary v. Hotelling*, *Id.*, 311); or he may waive the tort and affirm the sale, but rescind the credit; in which case he will sue as for goods sold. *Willson v. Foree*, 6 *Johns.*, 110; *Camp v.*

*Pulver*, 5 *Barb.*, 91; *Roth v. Palmer*, 27 *Id.*, 652; *Campbell v. Wright*, 21 *How. Pr.*, 9; and see *Pierce v. Drake*, 15 *Johns.*, 475; *Atwill v. Le Roy*, 4 *Abbotts' Pr.*, 438.

(m) These allegations of fraud are not the *gravamen* of the suit, but go to show the plaintiff's right to rescind the contract. *Roth v. Palmer*, 27 *Barb.*, 652; *Campbell v. Wright*, 21 *How. Pr.*, 9.

(n) The husband should be joined with the wife as defendant. Where the action concerns her separate property, the wife may sue alone; but it is only when the action is between herself and her husband that she can be sued alone. *Code*, § 114; *Smith v. Scribner*, 12 *How. Pr.*, 501; *Francis v. Ross*, 17 *Id.*, 561. Compare, however, *Walker v. Swayzee*, 3 *Abbotts' Pr.*, 136; *Arnold v. Ringold*, 16 *How. Pr.*, 158.

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 Complaint to charge Separate Estate of Wife.
 

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for her, upon, and for the benefit of, (o) her own separate lands and premises, situated in the town of \_\_\_\_\_, in the county of \_\_\_\_\_ . (p)

II. That the said defendant [*wife*] in consideration that the plaintiff would furnish such materials as aforesaid, then and there promised the plaintiff that she would pay for the same \_\_\_\_\_ dollars [*or, as much as they should be reasonably worth*], out of her own separate property, and did appoint the same to be paid for out of her separate property. (q)

III. That such [materials so furnished were reasonably worth the sum of \_\_\_\_\_ dollars, which] sum became due to the plaintiff from her on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, but no part thereof has been paid [except the sum of, &c.] \_\_\_\_\_.

IV. The plaintiff further shows, on information and belief, that the premises above mentioned and hereinafter more particularly described, were, at and before the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_ [which was the day of the marriage of defendants], since have been and now are, her sole and separate property; and the same are worth about \_\_\_\_\_ dollars, and are bounded and described as follows: [*description of premises*]. (r)

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(e) The form above given is adapted from that employed in *Dickerman v. Abrahams* (21 *Barb.*, 551), which was based upon the established principles, relative to the rights and liabilities of married women, which prevailed prior to the acts of 1848 and 1849. The weight of the decisions is, that those acts enlarged only the power of married women to hold and convey their separate estate, but did not operate to subject them to new remedies on their personal contracts. *Gates v. Brower*, 9 *N. Y.* (5 *Seld.*), 205; *Switzer v. Valentine*, 4 *Duer*, 96; *Cobine v. St. John*, 12 *How. Pr.*, 333; *Coon v. Brook*, 21 *Barb.*, 546; *Dickerman v. Abrahams*, *Id.*, 551; *Yale v. Dederer*, *Id.*, 286; *Lovett v. Robinson*, 7 *How. Pr.*, 105; *Phillips v. Hagadon*, 12 *Id.*, 17; *Wotkyns v. Abrahams*, 14 *Id.*, 191. Nor alter the mode of pleading. (See *Phillips v. Hagadon*, 12 *How. Pr.*, 17.) Compare, however, *Walker v. Swayzee* (3 *Abbotts' Pr.*, 136),

where a different view of the operation of those statutes was taken by the New York Common Pleas.

The above form is further supported by *Francis v. Ross*, 17 *How. Pr.*, 561.

As to the proper mode of pleading in an action on a contract under the acts of 1860 and 1862, compare *Coster v. Isaacs*, 16 *Abbotts' Pr.*, 328; *Baldwin v. Kimmel*, *Id.*, 353; *Young v. Gori*, 13 *Id.*, 13, *note*; *Thompson v. Sargent*, 15 *Id.*, 452; *Aitken v. Clark*, 16 *Id.*, 328, *note*.

(p) Alleging a sale and delivery to the husband, instead of alleging a sale and delivery to the wife on the faith of or for the benefit of her separate estate, is not sufficient. *Arnold v. Ringold*, 16 *How. Pr.*, 158.

(q) Merely alleging a sale on the credit of her estate, is insufficient on demurrer. *Bass v. Bean*, 16 *How. Pr.*, 93.

(r) This allegation which was not in

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For Goods Sold. Necessaries. Good-will, &c.

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Wherefore the plaintiff demands judgment (s) that the separate property aforesaid of the defendant [*wife*] be charged with the payment of the said sum of \_\_\_\_\_, with interest from \_\_\_\_\_, together with the costs of this action, and that the said property be applied to the payment of the same, and that a receiver be appointed to take possession of her said separate property, and dispose of it, or of so much thereof as shall be necessary to satisfy the same.

249. *For Necessaries furnished to Defendant's Wife or Children.*

I. That between the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, and the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, the plaintiff found and provided for one Y. Z., then the wife [*or*, infant son, *or*, infant daughter] of the defendant, at the request of said Y. Z., necessities for her use, to wit, \_\_\_\_\_, to the value of \_\_\_\_\_ dollars.

II. That said sum thereupon [*or*, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_], became due therefor from the defendant to this plaintiff, but no part thereof has been paid.

250. *By Assignee, for Price of Stock and Fixtures of Store and Good-will, agreed to be paid in Instalments.*

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, one M. N. sold and delivered to the defendant the stock and fixtures of the [drug-store, No. \_\_\_\_\_, in \_\_\_\_\_ street, in \_\_\_\_\_], the property of said M. N., and bargained, sold, and relinquished to the defendant the good-will of the business theretofore carried on by said M. N. there; for which the defendant agreed to pay said M. N. the sum of \_\_\_\_\_ dollars in equal quarterly payments on the \_\_\_\_\_ days of the months of \_\_\_\_\_ thereafter.

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the original complaint in *Dickerman v. Abrahams* (21 *Barb.*, 551), was held necessary in *Sexton v. Fleet*, 6 *Abbotts' Pr.*, 8; *Cobine v. St. John*, 12 *How. Pr.*, 333; *Coon v. Brook*, 21 *Barb.*, 546. For other averments showing a separate estate, see Forms 190-192, 198-200.

(s) This demand of judgment is conformable to the directions given in *Cobine v. St. John*, 12 *How. Pr.*, 333; and *Coon v. Brook*, 21 *Barb.*, 546. See, also, *Yale v. Dederer*, 22 *N. Y.*, 450; 31 *Barb.*, 525; 18 *N. Y.*, 265

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 Complaint for Price of Goods Sold.
 

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II. That he has not paid the same or any part thereof [except the sum of, &c.]

III. That thereafter and before this action said M. N. duly assigned to this plaintiff the indebtedness of the defendant therefor, of which the defendant had due notice.

251. *Against a Fraudulent Buyer, seeking an Injunction restraining Sale pending the Suit. (t)*

[*Allege sale, &c., as in Form 242 or 243.*]

II. That in order to induce the plaintiff to make said sale and delivery, and with intent to defraud him of said goods, the defendant then falsely and fraudulently represented himself to the plaintiff to be worth a large sum, to wit, \_\_\_\_\_, over and above all his just debts and liabilities, whereas in truth he was insolvent; and that induced by said false and fraudulent representations, and solely on the faith thereof, the plaintiff made said sale and delivery.

III. That thereafter, and with such intent, said defendant removed said goods to \_\_\_\_\_, and is about to sell and dispose of the same.

IV. That the defendant is insolvent and, as the plaintiff is informed and believes, a judgment against him will be unavailing and worthless, if he is suffered to sell and dispose of said goods.

Wherefore the plaintiff demands judgment against the defendant for the sum of \_\_\_\_\_, with interest thereon from the said \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, and that the defendant and his agents be enjoined from selling, disposing of, removing, or in any wise interfering with said goods or any of them, until such judgment be fully satisfied.

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(t) On a fraudulent purchase the seller may disavow the sale and reclaim the goods, or affirm the sale and sue for their price; and in the latter case it seems that an injunction may be granted under section 219 of the Code restraining the buyer from disposing of the goods. *Malcolm v. Miller*, 6 *How. Pr.*, 456; *Reubens v. Joel*, 13 *N. Y. (3 Kern.)*, 488; *Furniss v. Brown*, 8 *How.*

*Pr.*, 59; *Erpstein v. Berg*, 13 *Id.*, 91. But where the transfer has already been made, none but a judgment-creditor can restrain a disposition of the property by the fraudulent assignee. *Reubens v. Joel*, 13 *N. Y. (3 Kern.)*, 488; *Bayaud v. Fellows*, 28 *Barb.*, 451; *Perkins v. Warren*, 6 *How. Pr.*, 341; *Sebring v. Lant*, 9 *Id.*, 346.

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Action for Use and Occupation.

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## SECTION IV.

## COMPLAINTS IN ACTIONS FOR USE AND OCCUPATION. (a)

252. General form . . . . .	p. 195
253. For a fixed rent . . . . .	196
254. For pasturing . . . . .	196
255. For lodgings . . . . .	197

252. *General Form.* (b)

I. That the defendant occupied (c) the house and lot of the plaintiff, (d) No. , street, in [or otherwise describe

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(a) The foundation of this action is an agreement, express or implied, by which the tenant, with permission of the owner, occupied or had an exclusive right to occupy the premises. *Keating v. Bulkley*, 2 *Stark.*, 419; S. C., 3 *Eng. Com. L. R.*, 411; *Atkins v. Scrivener*, 2 *C. B.*, 654; S. C., 52 *Eng. Com. L. R.*, 653; *Selbey v. Browne*, 7 *Q. B.*, 620; S. C., 53 *Eng. Com. L. R.*, 620. If the occupation was contrary to the owner's will, his action must be for damages. *Smith v. Stewart*, 6 *Johns.*, 46; *Bancroft v. Wardwell*, 13 *Id.*, 489; *Featherstonaugh ads. Bradshaw*, 1 *Wend.*, 134; *Hall v. Southmayd*, 15 *Barb.*, 32. A contract may be implied. *Osgood v. Dewey*, 13 *Johns.*, 240; *Abeel v. Radcliff*, *Id.*, 297; *Porter v. Bleiler*, 17 *Barb.*, 149; *Ryerss v. Farwell*, 9 *Id.*, 615; *Harland v. Bromley*, 1 *Stark.*, 455; S. C., 2 *Eng. Com. L. R.*, 467. The plaintiff may give in evidence a lease not under seal, to prove that the relation of landlord and tenant existed, and what was the rent agreed. 1 *Rev. Stat.*, 748; *Williams v. Sherman*, 7 *Wend.*, 109; *Wood v. Wilcox*, 1 *Den.*, 37; and cases cited *supra*. And it has been held that since the Code a lease under seal may be given in evidence

under a complaint for use and occupation. *Ten Eick v. Houghtaling*, 12 *How. Pr.*, 523.

But an occupation must be shown, which is not necessary in an action on the lease. See the cases *infra*, and *Edwards v. Hetherington*, 7 *Dowl. R.*, 117; *Salisbury v. Marshall*, 4 *Car. & P.*, 65; *Cowie v. Goodwin*, 9 *Id.*, 378; *Smith v. Marrable*, 1 *Car. & M.*, 479; *Collins v. Barrow*, 1 *Moody & R.*, 112.

(b) This form is supported by *Waters v. Clark*, 22 *How. Pr.*, 104; *Hall v. Southmayd*, 15 *Barb.*, 32.

(c) The plaintiff need not set forth an implied demise, but may declare for use and occupation, and recover on the special facts shown. *Morris v. Niles*, 12 *Abbotts' Pr.*, 103; *Waters v. Clark*, 22 *How. Pr.*, 104.

(d) No tenancy can be implied under a party who has not the legal estate. *Morgell v. Paul*, 2 *Mann. & R.*, 303; S. C., 17 *Eng. Com. L. R.*, 303; *Evans v. Evans*, 3 *Ad. & E.*, 132; S. C., 102 *Eng. Com. L. R.*, 80. But one occupying and paying rent to an apparent proprietor as his landlord cannot, when sued, allege that he has only the equitable estate. *Dolby v. Hes*, 11 *Ad. & E.*, 335; S. C., 39 *Eng. Com. L. R.*, 195.

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Complaints for Rent ;—for Pasturing

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*the land*], by permission of the plaintiff, (e) as his tenant, from the            day of            , 18    , until the            day of            , 18    .

II. That the use of the said premises for that period, was reasonably worth            dollars.

III. That no part of the same has been paid [except the sum of, &c.] (f)

253. *For a Fixed Rent.*

I. That on the            day of            , 18    , at            , the defendant hired from the plaintiff the [first floor of the warehouse], No.            , street, in            , at the [yearly] rent of            dollars, payable [on the first day of every month].

II. That the defendant occupied the said premises from the day of            , 18    , to the            day of            , 18    .

[Or, where the defendant had abandoned possession, II. That the defendant took possession of and occupied the said premises under said agreement.] (g)

III. That the sum of            dollars, being the part of said rent due on the first day of            , 18    , is still unpaid.

254. *For Pasturing.*

[As in 252 or 253, substituting,] the pasture of the plaintiff in            , by his permission, as his tenant, for the grazing of his cattle [or, horses, &c.], from, &c.

Tenants in common may properly join in an action for use and occupation without showing a joint demise. Porter v. Bleiler, 17 Barb., 149. An infant may maintain this action although he has a general guardian. *Ib.*; and see Fitzmaurice v. Waugh, 3 Dowl. & R., 273; S. C., 16 Eng. Com. L. R., 169.

In an action for use and occupation, demands for rent which accrued in the lifetime of a decedent, and for rent accruing after his decease, while the tenancy was continued by the executors on account of the estate, are properly joined as one cause of action, against

the executors as such. Pugsley v. Aiken, 11 N. Y. (1 Kern.), 494.

(e) If the complaint shows that the occupation was a trespass, it is bad on demurrer. Hurd v. Miller, 2 Hill., 540.

(f) Interest may be recovered on a claim for use and occupation. Ten Eick v. Houghtaling, 12 How. Pr., 523. For allegation of demand, see Form 243.

(g) Actual continued occupancy is not necessary to be shown. Little v. Martin, 3 Wend., 220; Westlake v. De Graw, 25 Id., 669; Hoffman v. Delihanty, 13 Abbotts' Pr. 388.

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 For Rent.
 

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255. *For Lodgings. (h)*

[*As in 252 or 253, substituting,*] rooms in and part of the house of the plaintiff at [and if furnished, add, together with furniture, linen, and other household necessities of the plaintiff, which were therein]; by the plaintiff's permission as his tenant, from, &c.

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## SECTION V.

## COMPLAINTS FOR THE HIRE OF PERSONAL PROPERTY. (a)

256. On an account for the hire of horses, carriages, &c. .... p. 197  
 257. For the hire of a pianoforte, with damages for not returning it. .... 197  
 258. For the hire of furniture, &c., with damages for ill-use ..... 198

256. *On an Account for the Hire of Horses, Carriages, &c. (b)*

I. That between the            day of           , 18   , and the day of           , the defendant hired (c) from the plaintiff horses, carriages, and saddles, for which he owes the plaintiff on an account thereof, the sum of            dollars, which was payable on the            day of           .

II. That no part of the same has been paid [except the sum of, &c.]

257. *For the Hire of a Pianoforte, with Damages for not returning it.*

*First:* For a first cause of action,

I. That on the            day of           , 18   , at           , the defendant hired from the plaintiff one pianoforte, the property

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(h) For a complaint for board and amount of compensation claimed by lodging, see Form 272. plaintiff depends. *Relyea v. Drew*, 1

(a) As to Charter-parties, see *infra*.

*Den.*, 561.

A declaration on a contract for the hire of a thing, the compensation for which was to depend upon its earnings, must set forth the facts on which the

(b) For the authorities for this form, see *ante*, 163.

(c) "Hired," implies a request. *Emery v. Fell*, 2 *T. R.*, 28.

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Complaints for Hire of Personal Property, and Injuries thereto.

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of the plaintiff, for the space of [six] months, then next ensuing, to be returned to this plaintiff at the expiration of said time in good condition, reasonable wear excepted, for the use of which he promised to pay this plaintiff a reasonable sum. (*d*)

II. That                dollars was a reasonable sum for the hire of the same; which sum, on the        day of       , 18   , became due from the defendant to the plaintiff.

III. That no part of the same has been paid [except the sum of       ].

*Second:* And for a second cause of action,

I. The plaintiff further states, that the value of the piano-forte so hired by the defendant, as above alleged, was        dollars, (*e*) and that the defendant, not regarding his said undertaking to return the same to this plaintiff, has not returned the same, although he was, on the        day of       , 18   , at       , requested by the plaintiff so to do, to the damage of the plaintiff        dollars.

258. *For the Hire of Furniture, &c., with Damages for Ill-use.*

*First:* For a first cause of action,

I. That on the        day of       , 18   , at       , the defendant hired from the plaintiff household furniture, plate, pictures, and books, the property of the plaintiff, to wit: [*describe or enumerate the articles, or refer to a schedule annexed*]; for the space of        then next ensuing, to be returned by him to the plaintiff at the expiration of said time, in good condition, reasonable wear and tear thereof excepted.

II. That he promised to pay the plaintiff for the use thereof        dollars [in equal quarterly payments, on the        days of        thereafter]. (*f*)

III. That no part thereof has been paid [except the sum of       , &c].

*Second:* For a second cause of action,

I. This plaintiff further states, that the value of the property so hired by the defendant, as above alleged, was        dollars.

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(*d*) In case the amount was agreed    personal property, should state the value of the property.  
on, aver it as in the next form.

(*e*) The complaint in an action to recover damages for the conversion of    (*f*) If the amount was not agreed on, aver it as in preceding form



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 Actions for Work, Labor, and Services.
 

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II. That the defendant, not regarding the said undertaking to return the same in good condition, took so little care thereof, that through his negligence, carelessness, and ill-use, the same became broken, defaced, and damaged beyond the reasonable wear thereof, and in that condition were returned to the plaintiff, to his damage                      dollars.

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 SECTION VI.

## COMPLAINT IN ACTIONS FOR WORK, LABOR, AND SERVICES. (a)

259. General form .....	p. 200
260. The same, upon an account.....	201
261. For commissions of broker.....	201
262. For freight, against consignor.....	201
263. The same, against consignee .....	202
264. For writer's services in editing a newspaper.....	202
265. The same, for services in editing or compiling a book.....	202
266. By an architect, for his services.....	202
267. By a parent, for services of minor son.....	203
268. For work and materials furnished .....	203
269. The same, on an account.....	204
270. By an attorney, for services and disbursements.....	204
271. For tuition bills .....	205
272. For board and lodging .....	205
273. For stabling of horses .....	205
274. By proprietors of a newspaper, for advertising .....	205
275. By advertising agent, for services and disbursements .....	206
276. On a special contract, completely fulfilled.....	206
277. The same, where the contract was fulfilled by an assignee.....	208

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(a) The forms comprised in this section are appropriate, not only in actions for services rendered in pursuance of a verbal agreement, but also in actions where the work was undertaken in pursuance of a written contract, if the contract has been fully performed on the part of the plaintiff, or has been abandoned by agreement, or rescinded by the wrongful act of a party, or its execution is incomplete by reason of an excuse. *Farron v. Sherwood*, 17 *N. Y.*, 227; *Wolfe v. Howes*, 20 *Id.*, 197.

Where, however, there has been a

written contract, the plaintiff must in any case produce it on the trial, or account for its absence. *Clark v. Smith*, 14 *Johns.*, 326, and cases there cited; *Champlin v. Butler*, 18 *Id.*, 169; *Wood v. Edwards*, 19 *Id.*, 205; *Smith v. Smith*, 1 *Sandf.*, 206; *Ladue v. Seymour*, 24 *Wend.*, 60; *Sherman v. N. Y. Central R. R. Co.*, 22 *Barb.*, 239; *Adams v. Mayor, &c.*, of *N. Y.*, 4 *Duer*, 295.

Where there is a special agreement, and the plaintiff has performed on his part, so that nothing remains to be done by the contract but payment of

## Complaint for Services.

259. *General Form.*

I. That from the       day of       , 18       , to the       day of       , 18       , at       , the plaintiff rendered services to the defendant, at his request (b) \* as his household servant [*or otherwise. See the following forms.*].

II. That for said services the defendant promised to pay him       dollars per month. (c)

[*Or, II. That the same were reasonably worth       dollars, which sum became due therefor on the       day of       , 18       .*]

III. That no part of the same has been paid.

IV. [*Demand, if necessary, as in Form 243.*]

the stipulated price, he may rest his action upon the duty raised by the law on the part of defendant to pay the price agreed upon, or he may plead the express agreement, and allege performance. This rule is not affected by the Code. *Farron v. Sherwood*, 17 *N. Y.*, 227. The same rule applies where the plaintiff has rendered services which amount only to a part-performance by reason of an excuse,—for instance, his illness, which prevents him from complete performance. He is not bound, even here, to plead the contract and his excuse. *Wolfe v. Howes*, 20 *N. Y.*, 197. It has been held, however, that if the contract contains such special provisions as to the mode of performance as require an allegation of performance before the plaintiff would be entitled to recover, then the proper mode of declaring is still on the contract itself, and not on the general counts, setting it out at length, or in substance, with proper averments, to show that the conditions to the plaintiff's right of recovery have all been complied with. *Adams v. Mayor, &c.*, of *N. Y.*, 4 *Duer*, 295; *Atkinson v. Collins*, 30 *Barb.*, 430; *S. C.*, 9 *Abbotts' Pr.*, 353; *Brown v. Colie*, 1 *E. D. Smith*, 265.

(b) The fact that the plaintiff has rendered valuable services to the defendant for which the defendant has refused to pay him, constitutes no cause of action. The services must have been rendered in pursuance of an agreement express or implied that they were to be paid for. *Maltby v. Harwood*, 12 *Barb.*, 473; *Livingston v. Ackeston*, 5 *Con.*, 531; *Williams v. Hutchinson*, 3 *N. Y.* (3 *Comst.*), 312; *Griffin v. Potter*, 14 *Wend.*, 209; *Brunner v. Stout*, *Hard. (Ky.)*, 225; *Winston v. Francisco*, 2 *Wash. (Va.)*, 187; *Lee v. Welch*, 2 *Str.*, 793; 1 *Selv. N. P.*, 45; and cases *infra*. And where a promise to pay, made subsequent to the completion of the services, is shown, it must also be shown that the services were rendered at the defendant's request. *Bartholomew v. Jackson*, 20 *Johns.*, 28; *Frear v. Hardenbergh*, 5 *Id.*, 272; *Force v. Haines*, 2 *Harr. (N. J.)*, 385; *Parker v. Crane*, 6 *Wend.*, 647; *Comstock v. Smith*, 7 *Johns.*, 87; *Hayes v. Warren*, 2 *Str.*, 988; *Lampligh v. Brathwait*, 1 *Smith's Lead. Cas.*, 67, and *note*.

(c) Under a covenant to pay a salary at a certain rate, to be paid quarterly or half-yearly, according to the request of the plaintiff, the request is not a condition precedent, and it is not neces-

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 For Services, of Broker ;—of Carrier.
 

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260. *The Same, Upon an Account. (d)*

I. That the defendant is indebted to the plaintiff on an account for the work, labor, and services of the plaintiff [and his servants], \* in [*here state briefly the nature of the services,—see other forms*], performed at the request of the defendant, between the day of , 18 , and the day of , 18 , (e) in the sum of , and interest thereon from the day of , 18 . (f) .

II. That no part thereof has been paid [except the sum of, &c.]

261. *For Commissions of Broker.*

*As in preceding forms, substituting at the \**, as broker, in the purchase [*or, sale, or, both*] for defendant of stocks, bonds, and negotiable securities [*or, of real estate in* ], to the amount of dollars, (g) [*continuing as above*].

262. *For Freight, against Consignor.*

*As in preceding forms, substituting at the \**, in carrying in their vessel, the , from to , [100 barrels of flour, *or*, sundry goods and merchandise,] at the request of the defendant. (h)

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sary for the plaintiff to state a special request or demand in the declaration ; but the bringing the action is itself a legal demand. *Ernst v. Bartle*, 1 *Johns. Cas.*, 319.

(d) This form is sustained by *Moffet v. Sackett*, 18 *N. Y.*, 522. It is applicable even where there was an express contract, if the only thing special about the contract is the stipulation as to price.

(e) In order to be sufficiently definite and certain, the complaint should show the nature and character of the claim,

and the period within which it arose. *Farcy v. Lee*, 10 *Abbotts' Pr.*, 143.

(f) Bringing an action on a contract for services and materials, is a demand of payment, and plaintiff is entitled to interest at least from the commencement of the action. *Feeter v. Heath*, 11 *Wend.*, 477.

(g) This is at least sufficient on demurrer. *Merwin v. Hamilton*, 6 *Duer*, 244.

(h) That freight does not bear interest till after demand. *Schureman v. Withers*, *Anth. N. P.*, 230.

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Complaints for Services, of Carrier ;—of Writer ;—of Architect.

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263. *The Same, against Consignee.*

*As in preceding forms, substituting at the \**, in carrying in their vessel, the , from to , [100 barrels of flour, or, sundry goods and merchandise,] which were consigned to the defendant, and by the plaintiff delivered to him, and by him accepted.

264. *For Writer's Services in Editing a Newspaper. (i)*

*As in preceding forms, substituting at the \**, as an editor, in conducting the newspaper of the defendants, known as "The ,", and in writing and preparing articles and paragraphs for the same.

265. *The Same, for Services in Editing or Compiling a Book.*

*As in preceding forms, inserting at the \**, in compiling and editing a certain book entitled "The ,", and in preparing the same for the press, and revising and correcting the proofs of the same.

266. *By an Architect, for his Services.*

*As in preceding forms, inserting at the \**, as architect, in forming and drawing plans, and making estimates for, and superintending the erection of a dwelling-house to be known as No. , in street.

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(i) A stronger case is required to raise an implied promise on the part of the publisher to pay for the services of the author, than in the case of other services; and it seems that the furnishing of articles for publication at the request of the publisher is not of itself a service for which a promise to pay will be implied. See, as to the rights of the author without copyright, Opinion of Lord Campbell in *Donaldsons v. Becket*, 17 *Parl. Hist.*, 990; judgment reported in 4 *Burr.*, 2408; *Thurlow, arg.* in *Tonson v. Collins*, 1 *W. Blackst.*, 306; *Yates, arg.*, *Id.*, 333 (this case was never decided); *Beckford v. Hood*, 7 *T. R.*, 620, and see 627; *Chappell v. Birdy*, 14 *Mees. & W.*, 303; *Jeffreys v. Boosey*, 30 *Eng. L. & E. R.*, 1; *Wheaton v. Peters*, 8 *Pet.*, 591; *S. C.*, 11 *Curtis' Decis.*, 223.

Services of Minor Son.

For Work and Materials.

267. *By a Parent, for Services of a Minor Son.*

I. That one C. B. rendered services to the defendant, at his request, as a clerk in his store at \_\_\_\_\_, from \_\_\_\_\_, 18\_\_\_\_, until \_\_\_\_\_, 18\_\_\_\_.

II. That such services were reasonably worth \_\_\_\_\_ dollars [or, *allege price agreed, as in Form 259*].

III. That the said C. B. is the son of the defendant, and was then, and is now under twenty-one years of age.

IV. That no part of the same has been paid.

268. *For Work and Materials Furnished. (j)*

*As in Form 259, substituting at the \* in [here indicate briefly the nature of the services,—e. g., printing 1,000 copies of a book called "The \_\_\_\_\_"], and that the plaintiff then and there furnished the paper and other materials necessary in the said work (k) upon the like request, and that he delivered the same to the defendant.*

(j) If the services were rendered pursuant to a written agreement, it may in some cases be necessary to plead the agreement specially. See note (a), *supra*.

A distinction is to be observed between a contract to sell goods then in existence, and a contract for making and delivering goods not in existence. *Crookshank v. Burrell*, 18 *Johns.*, 58, and cases there cited. Where the person ordering the goods refuses to take them when made, it has been held, that the maker may deliver to a third party, with notice to the defendant, and sue for goods sold (*Bement v. Smith*, 15 *Wend.*, 493), or he may sue on the contract for damages for its breach (but in these cases the Statute of Frauds may defeat the claim), or he may sue for work done and materials furnished. *Cooper v. Elston*, 7 *T. R.*, 14; *Rondeau v. Wyatt*, 2 *H. Blackst.*,

63; *Sewall v. Fitch*, 8 *Cow.*, 215; *Prince v. Down*, 2 *E. D. Smith*, 525. And it has been held, that the plaintiff cannot, on an account for goods sold, recover merely upon proof of materials found by him, and used in services rendered. *Collerell v. Appsey*, 6 *Taunt.*, 322.

(k) Where an action is for work and materials furnished in the performance of such work, so that both items go to constitute but a single cause of action, this must be made to appear in the complaint, if the allegation is that the defendant is indebted, &c., for services, &c., and for goods and materials furnished, &c., the plaintiff may be compelled to strike out one of the claims, or amend by separating the causes of action, or showing that the items constitute but one cause of action. *Zundel v. Hintz*, *MS.*, *Supreme Ct., Chambers*, 1862.

269. *The Same, on an Account.*

*As in Form 260, inserting at the \*, in [here indicate briefly the nature of the services,—e. g., in painting the house of the defendant in said town, or, in making a carriage for the defendant, or, in repairing the machinery in the mill of the defendant in said town], and for materials and other necessary things furnished by this plaintiff in and about said work, on the like request.*

270. *By an Attorney, for Services and Disbursements. (l).*

I. That the defendant is indebted to the plaintiff in the sum of \_\_\_\_\_, upon an account for the services of the plaintiff as the attorney of the defendant, (m) rendered upon his retainer, (n) between the \_\_\_\_\_ day of \_\_\_\_\_, and the \_\_\_\_\_ day of \_\_\_\_\_, in prosecuting and defending certain suits; and for like services, at his request, in drawing, copying, and engrossing various instruments in writing, and in counselling and advising him, the defendant, and for divers journeys and other attendances in and about the business of said defendant [*according to the facts*], at his request; and for money paid out and expended by this plaintiff for the defendant, at his request, in and about

(l) This form is sustained by *Beekman v. Platner*, 15 *Barb.*, 550; and see 2 *Chitt. Pl.*, 68.

(m) If the services were rendered as attorney of another person than the defendant, facts showing the defendant's liability therefor must be alleged. *Merritt v. Millard*, 5 *Bosw.*, 645.

(n) Since the Code, in the absence of an agreement fixing the rate of compensation, a *quantum meruit* will be the measure of the recovery.

In an action by an attorney for his fees, it is necessary to aver and prove on the trial, a retainer or employment of the plaintiff as attorney, in the suit or business in which his services were rendered. Merely to show the performance of the services, is not sufficient. *Hotchkiss v. Leroy*, 9 *Johns.*,

142; *Burghart v. Gardner*, 3 *Barb.*, 64.

It is not necessary, however, to show a written retainer; that was anciently required, but is so no longer, though the practice of taking written retainers has been strongly recommended. *Owen v. Ord*, 3 *Carr. & P.*, 349; *Wiggins v. Peppin*, 3 *Beav.*, 340. See, also, *Allen v. Bane*, 4 *Id.*, 493. A parol employment will suffice; or the jury may infer a retainer from acts of the client, in the progress of the suit, amounting to a recognition of the attorney, or from his undertaking to pay for the services. A pleading drawn in the handwriting of the attorney and subscribed by him, but verified by the party, is sufficient evidence. *Harper v. Williamson*, 1 *McCord*, 156.

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For School Bills ;—For Board ;—For Advertising.

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said suits and business, which sum became due and payable, from the defendant to the plaintiff, on the            day of            , 18   .

II. That on said day [*or*, on the            day of            , 18   , at            ], payment of the same was duly demanded (*o*) from the defendant by this plaintiff, but no part thereof has been paid [except the sum of, &c.]

*271. For Tuition Bills.*

*As in Form 260, substituting at the \**, in instructing the defendant's children in various useful branches of learning, and for books, papers, and other necessary things furnished by this plaintiff in and about said work, at the like request [and for the board, lodging, and other necessities for said children, provided by the plaintiff during said time, at the like request].

*272. For Board and Lodging.*

I. That from the            day of            , 18   , until the day of            , 18   ,\* the defendant occupied certain rooms in, and part of, the house No.            street,            , by permission of the plaintiff, and was furnished by the plaintiff, at his request, with food, attendance, and other necessities.

II. That in consideration thereof, the defendant promised to pay            dollars [*or*, the same were reasonably worth the sum of            dollars].

III. That the defendant has not paid the same.

*273. For Stabling of Horses.*

*As in preceding form, inserting at the \**, the plaintiff, at the request of the defendant, provided for, kept, and fed the two horses of the defendant.

*274. By Proprietors of a Newspaper, for Advertising.*

I. That these plaintiffs, at the times hereinafter mentioned, were the proprietors and publishers of the daily newspaper known as "The            , " published in            .

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(*o*) Demand is unnecessary, except to            therefore need not be averred unless it charge the defendant with interest, and            is intended to claim interest.

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 Complaints for Services ;—Advertising.
 

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II. That on the            day of           , 18    [or, if there were several insertions, between the            day of           , 18   , and the            day of           , 18   ], these plaintiffs rendered services to the defendant, at his request, in publishing in their said newspaper the advertisements of the defendant [or, of the           , in which defendant was interested].

[Continue as in Form 260, paragraphs II. and III.]

275. *By Advertising Agent, for Services and Disbursements.*

I. That between the            day of           , 18   , and the day of           , 18   , at           , this plaintiff rendered services to the defendants, at their request, in causing the defendants' advertisements of their business to be inserted in the following named newspapers and periodicals: [*names of papers, or annex and refer to a list*].

II. That this plaintiff, for such insertions, for the use of the defendants, and at their request, paid out [and incurred liability to pay] the sum of            dollars, the amount of which payments, together with a reasonable sum for said services, the defendants promised to pay this plaintiff. (*p*)

III. That such services were reasonably worth the sum of            dollars, which sum, with the amount of said disbursements, became due on the            day of           , 18   , but no part thereof has been paid [except the sum of           ].

276. *On a Special Contract, Completely Fulfilled. (g)*

I. That on the            day of           , 18   , (*r*) the defendants [in consideration of           ], (*s*) executed (*t*) in writing

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(*p*) If the contract was in writing, as is usual in large transactions, it may be specially pleaded.

(*g*) It is not always necessary to set forth the contract as in this form. See note (*a*), *supra*. If the plaintiff has a claim for extra work done independent of the written contract, it may be stated as a separate cause of action for services and materials, &c., as in the preceding forms.

If the contract set forth forbids extra

work, unless expressly authorized, the plaintiff, to recover for it, should allege either a special employment, or, if he relies on the defendant's acceptance of it, should show that it was so distinct from the work called for by the contract that the latter might have been accepted without the former. *Duncan v. Commissioners of Miami, 19 Ind. (Kerr), 154.*

(*r*) The time of making the contract should be stated. 1 *Chit. Pl.*,



## On Contracts for Services, &amp;c.

under their hands and seals (*u*) [and delivered (*v*) to the plaintiff] a contract (*w*) with the plaintiff, of which the following is a copy : [*copy contract*]. (*x*)

II. That thereafter and before the                      day of                      , 18                      , the plaintiff duly performed all the conditions thereof on his part. (*y*)

313. But under the Code it is only necessary where the complaint would not be sufficiently definite and certain without it.

(*s*) If the complaint avers that the agreement was under seal, it need not allege any consideration. The seal imports one. *McCarty v. Beach*, 10 *Cal.*, 461; *Willis v. Kempt*, 17 *Id.*, 98. In Iowa and Indiana written agreements generally import a consideration. *Tousley v. Olds*, 6 *Clark (Iowa)*, 526.

(*t*) An averment that an agreement was "executed," amounts to an averment that it was "subscribed" by the party to be charged. *Cheney v. Cook*, 7 *Wis.*, 413.

(*u*) The words "witness our hands and seals," and the "Locus Sigilli" in the copy of the instrument set forth, did not before the Code supply the place of an averment that the instrument was sealed (*Cabell v. Vaughan*, 1 *Saund.*, 291, note 1; 1 *Chit. Pl.*, 109, 311; *Van Santvoord v. Sanford*, 12 *Johns.*, 197; *Macomb v. Thompson*, 14 *Id.*, 207; *Stanton v. Camp*, 4 *Barb.*, 374); although certain words of art,—*e. g.*, "indenture," "deed," "writing obligatory,"—were held to import a seal. *Cabell v. Vaughan*, *supra*, and cases there cited; and *Id.*, 320, note 3. So an allegation that a party covenanted "by indenture," imports that the covenant was under seal. *Phillips v. Clift*, 4 *Hurlst. & N.*, 168.

(*v*) An averment that one covenanted by his deed or other sealed instrument imported a delivery, and a distinct averment of delivery is not necessary, unless the time is material. *Cro. Eliz.*, 178; *Cro Jac.*, 420; 2 *Ld. Raym.*,

1538; *Tompkins v. Corwin*, 9 *Cow.*, 255; *Cecil v. Butcher*, 2 *Jac. & W.*, 571; *Brinckerhoff v. Lawrence*, 2 *Sandf. Ch.*, 400. So an averment that defendant made his contract in writing, imports a delivery of it. *Prindle v. Caruthers*, 15 *N. Y.*, 425. See Form 289, note (*b*).

(*w*) It is only the actual and existing contract, that should be pleaded. And if a former contract has been wholly superseded by a subsequent contract, the latter alone should be set forth. *Chesbrough v. N. Y. & Erie R. Co.*, 13 *How. Pr.*, 557.

(*x*) Instead of setting forth the contract, it will in many cases be more convenient to annex a copy, and say, "of which a copy is hereto annexed, and marked Exhibit A."

It was held at common law that where a contract was uncertain, the pleader must aid it by alleging what he deemed its legal effect. Thus, if no time was stated, it must be averred that the performance was to be in a reasonable time, or upon request. *Osborne v. Lawrence*, 9 *Wend.*, 135; and see *Coonley v. Anderson*, 1 *Hill*, 519. But under the Code this is unnecessary, for that which the law implies upon the facts need not be alleged. The only respect in which the contract needs to be aided in pleading is in alleging a consideration, where this is not sufficiently expressed or implied in the contract.

(*y*) This is a sufficient averment of performance. *Code*, § 162.

In an action on a contract by which the plaintiff had bound himself to do certain acts, and to procure third par.

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Complaint on Special Contract fulfilled by Assignee.

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III. That on the            day of           , 18   , at           , the plaintiff duly demanded of the defendants payment of the sum of            dollars [being the last instalment] in said contract mentioned. (z)

IV. That no part of the same has been paid [except, &c.]

*277. The Same, where the Contract was Fulfilled by an Assignee.*

I. That on the            day of           , at           , defendants in consideration of           , executed in writing under their hands and seals, and delivered, a contract with one M. N., of which the following is a copy [*or*, of which a copy is hereto annexed, and marked Exhibit A.]

II. That thereafter and before the            day of           , said M. N. duly assigned the same, and all his rights under it to the plaintiff.

III. That up to the time of the assignment, the assignor had duly performed all the conditions of the contract on his part, and that since said assignment, the plaintiff duly performed all the conditions thereof on his part. (a)

[*Continue as above, III and IV.*]

ties to do certain acts, he may, under section 162, allege performance by averring that he has fully and faithfully performed, &c., on his part; and adding that those on whose behalf he acted have also performed, is unnecessary. *Rowland v. Phalen*, 1 *Bosw.*, 43.

Where the plaintiff does not aver performance in this short mode authorized by the Code, but undertakes to set forth the facts showing performance, he may be held to aver them with the certainty required by the rules of pleading before the Code. *Hatch v. Peet*, 23 *Barb.*, 575. If the contract has been modified, it is not sufficient to use the above allegation of performance, adding, "except" in such and such particulars, setting out the modifications.

In such case the plaintiff should plead the modified contract. *Smith v. Brown*, 17 *Barb.*, 431. See Form of Complaint on such a contract, Section XII., Art. IV., *infra*.

(z) Demand need not be averred in such an action, except where it is necessary to charge the defendant with interest.

(a) One suing on a contract assigned to him may allege performance by saying that up to the time of the assignment the assignor had performed, on his part, all the covenants of the contract, and that afterwards the plaintiff fully performed the conditions imposed by the contract on the assignor. *California Steam Navigation Co. v. Wright*, 6 *Cal.*, 258.

## On a Compromise.

## SECTION VII.

## EXPRESS PROMISES (a) TO PAY MONEY UPON VARIOUS CONSIDERATIONS.

278. Upon a compromise of a suit .....	p. 209
279. The same, for withdrawing opposition to the probate of a will .....	210
280. Upon a promise made to a third person, to pay money to the plaintiff. ....	210
281. On a promise to pay for the surrender of a lease .....	211
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283. On an express promise, in consideration of a precedent debt .....	212
284. On a debt barred by the Statute of Limitations, or a discharge, and re- vived by a new promise .....	213

278. *Upon a Compromise of a Suit.*

I. That on the                      day of                      , an action was pending between the parties to this action, brought by the plaintiff to recover from the defendant the sum of                      dollars, which the defendant owed the plaintiff, but which he disputed. (b)

II. That in consideration that the plaintiff would discontinue his said action, and would accept                      dollars in satisfaction of said disputed claim, the defendant promised to pay the plaintiff the sum of                      dollars [on the                      day of                      ].

III. That the defendant accordingly did discontinue said action. (c)

[Or, III. That the plaintiff has duly performed all the conditions thereof on his part.]

(a) In pleading a contract which the Statute of Frauds requires to be in writing, it is not necessary to allege the facts relied on to take the case out of the statute. It is sufficient, on demurrer, to allege that a contract was made. Such an allegation is to be understood as intending a real contract,—something which the law would recognize as such, and not repudiate as void. It is held that there is no reason for departing, under the Code, from the former well-settled rule in law and equity. The existence of a writing in such case is matter of evidence, it is not one of the pleadable facts. *Livingston v. Smith*, 14 *How. Pr.*, 490; *Stern v. Drinker*, 2 *E. D. Smith*, 401; *Ambur-*  
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*ger v. Marvin*, 4 *Id.*, 393; *Dewey v. Hoag*, 15 *Barb.*, 365; *Washburn v. Franklin*, 7 *Abbotts' Pr.*, 8; S. C., less fully, 28 *Barb.*, 27; *Thurman v. Stevens*, 2 *Duer*, 609; and see *Le Roy v. Shaw*, *Id.*, 626; *Mérwin v. Hamilton*, 6 *Id.*, 244. The rule is otherwise in Indiana. *Estep v. Burke*, 19 *Ind. (Kerr)*, 87.

(b) A complaint on a promise in consideration of a compromise, should show that there was some shadow of a claim (*Dolcher v. Fry*, 37 *Barb.*, 152); though it need not show that the plaintiff had a valid claim. *Palmer v. North*, 35 *Id.*, 282.

(c) It must also aver that the litigation was discontinued according to the compromise. *Dolcher v. Fry*, 37 *Barb.*, 152.

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 Complaint on Compromise.
 

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IV. That no part of said sum has been paid [except the sum of, &c.]

279. *The Same, for Withdrawing Opposition to the Probate of a Will.*

I. That heretofore one M. N. died, leaving him surviving A. B. this plaintiff, one of his heirs-at-law [*or*, next of kin].

II. That after his death the defendant [and others] produced and propounded for probate, in the court of the surrogate of \_\_\_\_\_, an instrument purporting to be the will of said M. N., whereby [a part of] the estate to which the plaintiff would have succeeded if said M. N. had died intestate, was devised and bequeathed to the defendant. (*d*)

III. That there were doubts as to the validity of said devises and bequests [*or*, of the execution of said will, *or both*], and that the plaintiff threatened to oppose its probate on that account. (*e*)

IV. That in consideration that the plaintiff would withhold all opposition to the proving of the will, the defendant, on the \_\_\_\_\_ day of \_\_\_\_\_, promised that he would pay to the plaintiff the sum of \_\_\_\_\_ dollars [on, &c.]

V. That the plaintiff accordingly withdrew all opposition to the probate of the will, and it was thereupon duly proved before said surrogate.

[*Or*, V. That the plaintiff has duly performed all the conditions thereof on his part.]

VI. That no part of said sum has been paid [except the sum of, &c.]

280. *Upon a Promise made to a Third Person, to pay Money to the Plaintiff.* (*f*)

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, one M. N. was, and ever since has been, indebted to the plaintiffs in the sum of \_\_\_\_\_ dollars.

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(*d*) The plaintiff should show that he would have derived a benefit from setting aside the will. *Seaman v. Seaman*, 12 *Wend.*, 381.

oppose it is enough. *Seaman v. Seaman*, 12 *Wend.*, 381; *Palmer v. North*, 35 *Barb.*, 282.

(*e*) It need not be alleged that the will was void. A substantial right to

(*f*) This form is supported by *Dela ware & Hudson Canal Co. v. Westchester County Bank*, 4 *Den.*, 97.

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On Promise to Pay for Surrendering Lease.

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II. That on that day, the said M. N., being the holder of a bill of exchange [*describing it*], indorsed and delivered the same to the defendants, in consideration of which the defendants then and there promised M. N. that they would endeavor to collect the same, and that when collected they would apply the proceeds in payment of said indebtedness of said M. N. to the plaintiffs.

III. That afterwards, and on the                      day of                      , the defendants collected and received the amount thereof. (*g*)

IV. That no part of the same has been paid to the plaintiff. (*h*)

281. *On a Promise to Pay for the Surrender of a Lease. (i)*

I. That at the time hereafter mentioned, the plaintiff had a lease of a house and lot in the town of                      , for a term commencing on the                      day of                      , 18                      , and ending on the                      day of                      , 18                      , under which he was entitled to the possession of said house and lot.

II. That on the                      day of                      , the defendant being the owner of [*or, having purchased*] the reversion of said premises, subject to the unexpired term of the lease, promised the plaintiff that in consideration that he, the plaintiff, would surrender to the defendant the unexpired term and the possession, he would pay the plaintiff the sum of                      dollars [*on, &c.*]

III. That the plaintiff thereupon accordingly surrendered the unexpired term and the possession to the defendant.

[*Or, III.* That the plaintiff duly performed all the conditions thereof on his part.]

IV. That no part of said sum has been paid [*except the sum of, &c.*]

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(*g*) On a promise to pay money when collected, collection is condition precedent, and must be averred. *Dodge v. Coddington*, 3 *Johns.*, 146.

(*h*) In an action for a breach of an agreement to pay money to A. for the benefit of B., it is not necessary to aver that the defendants have refused to pay

to B., as well as to the plaintiff. If a delivery to the former is, in law, sufficient to satisfy the agreement, it is matter of defence to be set up in the answer. *Rowland v. Phalen*, 1 *Bosw.*, 43.

(*i*) This form is supported by *Ambler v. Owen*, 19 *Barb.*, 145.

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Complaints on Express Promises to Pay.

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282. *For the Consideration-money of a Conveyance.* (j)

I. That on the            day of           , 18   , at           , this plaintiff sold and conveyed to the defendant, at his request, (k) certain premises in the town of           , known and described as follows: [*designate the premises*]. (l)

II. That the defendant agreed to pay the plaintiff therefor the sum of            dollars, on the            day of           , 18   .

III. That no part of the same has been paid [except the sum of, &c.]

283. *On an Express Promise, in Consideration of a Precedent Debt.* (m)

I. That on the            day of           , at           , the defendant being then indebted to the plaintiff in the sum of            dollars for [*here state concisely the consideration, e. g., goods heretofore sold and delivered by the plaintiff to the defendant*], in consideration thereof promised the plaintiff that he would pay him said sum on the            day of            [*or, on demand, or otherwise, as the case may be*].

II. That no part thereof has been paid [except the sum of, &c.]

---

(j) Assumpsit will lie for the consideration of a deed, although there was no valid contract under the Statute of Frauds (*Thomas v. Dickinson*, 12 *N. Y. (2 Kern.)*, 364), notwithstanding the deed contains a receipt for the consideration. *Shepard v. Little*, 14 *Johns.*, 210; *Bowen v. Bell*, 20 *Id.*, 338; *Thomas v. Dickinson*, 12 *N. Y. (2 Kern.)*, 364.

(k) As to the necessity of an averment of request in assumpsit for the purchase-money of lands, see 1 *Saund.*, 264, note 1; *Comstock v. Smith*, 7 *Johns.*, 87, and cases there cited; *Parker v. Crane*, 6 *Wend.*, 647. The declaration of an owner of land taken for local improvements, need not aver that the corporation has taken possession, if

they are concluded by the confirmation of the assessment. *Stafford v. Mayor, &c.*, of Albany, 7 *Johns.*, 541.

(l) It is said that in assumpsit for lands sold, &c., as well as for use and occupation, it is unnecessary to state the situation, &c., of the lands, and unadvisable to do so, because a variance would be fatal. 2 *Chitty's Pl.*, 39, note e; 42, note g. But under the Code, the variance would be disregarded, unless it was shown to have misled the defendant; and a description sufficient to identify the premises is necessary to give the complaint the requisite definiteness and certainty.

(m) This form is supported by *Harlem Canal Co. v. Spear*, 2 *Hall*, 510.

## On Express Promises.

284. *On a Debt barred by the Statute of Limitations, or a Discharge, and Revived by a New Promise. (n)*

[*Plead the original cause of action as in other cases, and continue.*]

(n) This form should not be used without consideration, for its propriety turns upon diverse provisions of different Codes and unsettled questions. See *ante*, 189, note (j).

There is much conflict in the authorities as to the proper mode of pleading a debt which has been barred by the Statute of Limitations, or by a discharge in insolvency or bankruptcy. It is settled in this State that in an action under the Code upon a demand which, but for a new promise, would be barred by the Statute of Limitations, the complaint may be upon the original demand; and if the Statute of Limitations is interposed as a defence, the new promise or acknowledgment may be given in evidence to avoid it, without being alleged in the pleadings (*Esselstyn v. Weeks*, 12 *N. Y.* (2 *Kern.*), 635; *S. C.*, 2 *Abbotts' Pr.*, 273; *Clark v. Atkinson*, 2 *E. D. Smith*, 112); and it was the rule at common law that the action might be on the original demand, and if the Statute of Limitations were interposed the defendant might set up the new promise by replication; and the same rule applied in the case of a debt revived by a new promise after a discharge in bankruptcy or insolvency. *Shippey v. Henderson*, 14 *Johns.*, 178; *Depuy v. Swart*, 3 *Wend.*, 135; *Fitzgerald v. Alexander*, 19 *Id.*, 403; and see *McNair v. Gilbert*, 3 *Id.*, 344.

In California it is held by a recent case that where a demand barred by the Statute of Limitations or by a discharge in insolvency, is revived by a new promise, the action must be on the original demand, and the new promise is only a waiver of the defence. *Smith v. Richmond*, 19 *Cal.*, 476.

In Ohio the rule seems to be that where a new promise or acknowledgment has been made, the plaintiff may state the demand barred, as a consideration of the new promise, and allege the new promise in writing as the cause of action. *Sturges v. Burton*, 8 *Ohio St.*, 215.

In Iowa the new promise must be alleged. See 12 *Iowa*, 291.

In the case of a *voluntary release* and a subsequent new promise reviving the debt it was held in *Stearns v. Tappin* (5 *Duer*, 294), that the action must be upon the new promise, and that a variance between the allegation of a subsisting note, as a cause of action, and the evidence of a new promise to pay a note which has been extinguished by a release, cannot properly be disregarded on the trial. The only cause of action alleged in the complaint, viz., the note, is in such case disproved in its entire scope and meaning by the release. Proof of the new promise would substitute a new cause of action, which the defendant had not been required to answer, and to which the defence in his answer was not at all directed.

This question will be much simplified by a more exact use of the term "cause of action." It may be urged with reason that where an indebtedness against which the statute has run or which has been released in any way so as to leave a debt of imperfect obligation which the law will not enforce, but which is a sufficient consideration for the new promise, and a new promise is thereupon made, the original debt and the new promise are not separate causes of action. The plaintiff has not two causes of action, there is but one.

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 Complaints on Instruments for Payment of Money only.
 

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II. That thereafter on the                      day of                      , (o) in consideration of the foregoing facts, the defendant promised (p) to the plaintiff that he would pay such indebtedness. (q)

III. That no part of the same has been paid [except the sum of, &c.]

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## SECTION VIII.

## SHORT MODE OF PLEADING ON INSTRUMENTS FOR THE PAYMENT OF MONEY ONLY.

[In an action or defence founded upon an instrument for the payment of money only, it is sufficient for a party to give a copy of the instrument, and to state that there is due to him thereon from the adverse party a specified sum which he claims. (a) This is not applicable to instruments which provide for any thing else than the payment of money,—*e. g.*, an action for rent on a lease.] (b)

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He has two sets of facts, either of which might perhaps support his action; but averring both classes of facts, like assigning two breaches of a bond, only states a single cause of action. Alleging both the original debt and the new promise may make a double issue, but it does not make a double cause of action. The Code does not disallow double issues.

The above form is not sanctioned by authorities, for all cases; but upon any view perhaps it might be sustained on demurrer, even in those States where it is held necessary to rely on the new promise. In *Smith v. Richmond* (15 Cal., 501), where the complaint framed in this way after alleging a note, went on to state that defendant having afterwards obtained a discharge in insolvency, subsequently made a new promise, it was held that the new promise should be deemed the cause of action, and the note merely inducement.

It may be obnoxious in this State to a motion to strike out. See Form 246, *ante*, and *notes*.

(c) In pleading a subsequent promise,

in order to avoid the Statute of Limitations, it is necessary to aver definitely the time of such promise; a general averment of repeated acknowledgments amounts to nothing. *Bloodgood v. Bruen*, 8 N. Y. (4 Seld.), 362; reversing S. C., 4 Sandf., 427.

(p) Where a promise to pay a debt is relied on to take a case out of the Statute of Limitations, it is not necessary, in pleading, to allege that it was in writing, signed by the party. *Lynch v. Musgrave, Hayes & Jones*, 821.

(q) If the new promise be conditional, it should be so stated, and performance of the condition averred. *Wait v. Morris*, 6 Wend., 394.

(a) *Code of Pro.*, § 162. The earlier cases held that the plaintiff must also allege that the defendant made the instrument, and that the defendant owns it, and show how he became the owner in case he was not a party to it. But these decisions are now clearly overruled. *Keteltas v. Myers*, 19 N. Y., 231; *Prindle v. Caruthers*, 15 Id., 425; *Genet v. Sayre*, 12 *Abbotts' Pr.*, 347,



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 On Instruments for Payment of Money only.
 

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285. General form.....	p. 215
286. Averment of performance of conditions precedent.....	216
287. Averment of consideration.....	216
288. Averment that defendant made the instrument.....	217

285. *General Form.*

I. That his action is founded on an instrument for the payment of money only,\* made and delivered by defendant to plaintiff, of which the following is a copy: [*copy of the instrument*]. (c)

II. That there is due to the plaintiff thereon from the defendant the sum of                      dollars [with interest from                      ], † which he claims, and asks judgment for.

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Butchers & Drovers' Bank v. Jacobson, 15 *Abbotts' Pr.*, 218; *Swan's Pl.*, 183, 189; *Ohio Life Ins. & T. Co. v. Goodin*, 1 *Handy*, 31. The opinions in *Prindle v. Caruthers*, which is the leading case, are not harmonious, but that of SHANKLAND, J., lays down the rule that this provision constitutes an exception to the rule that the facts constituting the cause of action must be stated, and was intended to adopt and extend the brief method of declaring on bills and notes under the old practice, by annexing a copy to the money counts.

Under that practice, where an indorsee suing an acceptor omitted to give a copy of the indorsement, the defect was disregarded. Delivery was sufficiently averred by implication, and indorsement is unnecessary to transfer the title. *Purdy v. Vermilya*, 8 *N. Y.* (4 *Seld.*), 346.

From this view of the statute it will follow that even if there are conditions precedent to the liability of the defendant, performance need not be averred. But as there are no cases in which this point has been passed upon, it may be thought better to aver performance as above in Form 286.

(b) *Swan on Pl.*, 182. In Ohio this

provision extends to accounts, and other instruments "for the unconditional payment of money only." It is there held that a judgment cannot be so pleaded. *Memphis Medical College v. Newton*, 2 *Handy*, 163.

(c) Where the instrument was a note payable to G. W., and the plaintiff named himself as Gilbert W., it was held that he should be presumed the same. *Marshall v. Rockwood*, 12 *How. Pr.*, 452. Where the defendants were named individually without alleging a partnership, and the instrument was signed in the name of one of them "& Co.," the complaint was held sufficient. *Butchers & Drovers' Bank v. Jacobson*, 15 *Abbotts' Pr.*, 218; *S. C.*, 24 *How. Pr.*, 204.

If the instrument is in a foreign language it is sufficient on demurrer to set it forth in that language. *Nourny v. Dubosty*, 13 *Abbotts' Pr.*, 128. But it is the better practice in such cases to plead it according to its legal effect, as in the forms given in subsequent sections. All pleadings are to be in the English language (2 *Rev. Stat.*, 275, § 9). And the court does not take judicial notice of the meaning of words in a foreign language.

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Performance. Consideration.

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286. *Averment of Performance of Conditions precedent.*

[*Insert after the copy of the instrument,*] II. That the plaintiffs [and the holders thereof] have duly performed all the conditions on their part. (*d*)

287. *Averment of Consideration. (e)*

[*Insert after the copy of the instrument,*] II. That the defendant made the same for value received [*or, made the same in*

(*d*) This is the short form of pleading the performance of conditions precedent in any contract, under § 162 of the Code—which provides that it shall not be necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading shall be bound to establish on the trial the facts showing such performance. See *ante* 208, notes (*y*) & (*a*).

Section 57 of the English common-law procedure act, authorizes a general averment of the performance of conditions, as do our Codes; and it is the common practice to aver, in the same general way, the happening of all events that are conditions, by saying that "all things happened and all times elapsed necessary to entitle the plaintiff," &c. But this is held not to be authorized by the provision of the statute, and the adverse party may require a more particular statement of the happening of events other than the performance by the pleader. *Williams on Pl.*, 117, note *n*. This may be taken with some qualification where the events so averred may be presumed equally in the knowledge of the adverse party as of the pleader.

The general averment of the performance and happening of all things necessarily imports a sufficient statement of being ready to do all things

necessary in the future. *Bentley v. Dawes*, 9 *Exch.*, 666.

In actions against indorsers of notes and bills, and drawers of bills, the demand and notice necessary to charge the indorser may be more safely averred in the form given on page 232. See *Conkling v. Gandall*, 1 *Keyes*, 228.

Where the conditions contained in the contract have been modified, or plaintiff has become excused from them, an averment of performance is not proper; the modifications or excuse should be stated, and performance alleged accordingly. *Oakley v. Morton*, 11 *N. Y.* (1 *Kern.*), 25. But a tender, since it is an act *in pais*, and no part of the contract, is governed by a different rule, and under an averment of a tender the plaintiff may prove a waiver of it by the defendant. *Holmes v. Holmes*, 9 *N. Y.* (5 *Seld.*), 525. The first of these rules as to pleading excuse from conditions was applied, under the Code, in *Garvey v. Fowler*, 4 *Sandf.*, 665, and in *Shultz v. Depuy*, 3 *Abbotts' Pr.*, 252, in a broader way than it would have been before the Code. In neither of these cases was the above provision of section 162, relied on. Compare, as to its effect in such cases, *Smith v. Brown*, 17 *Barb.*, 431.

(*e*) Where the instrument neither expresses a consideration, nor, as in the case of a sealed instrument or negotia-

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 Instruments for Payment of Money only.
 

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consideration of goods theretofore sold and delivered to him by the plaintiff; *or*, of services theretofore rendered to him by the plaintiff, at his request, *or otherwise state the nature of the consideration*].

288. *Averment that the Defendants Made the Instrument.* (f)

I. That on the            day of            , 18    , at            , the defendants [being then partners under the firm-name of Y. Z. & Co.] (g) made their promissory note [*or*, made and sealed their bond] in writing, of which the following is a copy :

II. [*Continue as in Form 285.*]

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## SECTION IX.

### COMPLAINTS ON PROMISSORY NOTES.

[The most convenient form of pleading bills and notes in ordinary cases is that given in the preceding section. More specific forms are here given, which the pleader will in some cases prefer to those, either for the purpose of setting forth extrinsic facts, or in order to put the defendant to specific denials.

The forms in this section are appropriate for notes drawn without the words "or order," "bearer," &c., as well as for those containing such words.] (a)

#### I. PAYEE AGAINST MAKER.

289. Ordinary form, pleading the legal effect of the note. . . . . p. 219

290. On two notes, one being partly paid. . . . . 220

291. Several notes given upon an agreement to pay all upon a default in any. . . . . 221

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ble paper, imports one, a consideration should be averred (*Spear v. Downing*, 12 *Abbotts' Pr.*, 437); though perhaps this might be implied from the term "contract," if that were used to designate the instrument. *Prindle v. Caruthers*, 15 *N. Y.*, 425.

(f) This form may sometimes be preferred in order to require specific denials from the defendant.

(g) Where it is desired to aver a consideration, insert here "for value re-

ceived," or "in consideration of," &c., as in Form 287.

(a) A written promise to pay to "A. B.," without adding "or order," or "or bearer," is a promissory note within the the statute. *Burchell v. Slocock*, 2 *Ld. Raym.*, 1545; *Smith v. Kendall*, 6 *T. R.*, 123; *Downing v. Blackenstone*, 3 *Cai.*, 137; *Goshen & Minisink Turnpike Co. v. Hurtin*, 9 *Johns.*, 217.

For complaints on notes payable in chattels, &c., see Section XII., Art. IX.

## Analysis of the Section.

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## On Promissory Notes.

## I. PAYEE AGAINST MAKER.

289. *Ordinary Form, Pleading the Legal Effect of the Note.*

I. That heretofore the defendant made (b) his promissory note in writing, \* dated on the            day of           , 18   , at           , and thereby promised to pay to the plaintiff (c) [or his order]            dollars,            months (d) after said date [or, on the day of           ] (e)

(b) It is not necessary to add an averment of delivery where the plaintiff is the payee. "Made" imports delivery. *Churchhill v. Gardner*, 7 *T. R.*, 596; *Chamberlain v. Hopps*, 8 *Verm.*, 94; *Russell v. Whipple*, 2 *Cow.*, 536; *Prindle v. Caruthers*, 15 *N. Y.*, 425; *Keteltas v. Myers*, 19 *Id.*, 231; and see note (g), p. 229, *infra*.

(c) A complaint pleading a note according to its legal effect must state a payee, otherwise it seems it is demurrable. *White v. Joy*, 13 *N. Y.* (3 *Kern.*), 83.

In case the note is payable to the order of a fictitious person, and in case it is payable to the maker's own order, it is in law payable to bearer. 2 *Rev. Stat.*, 178; *Minet v. Gibson*, 1 *H. Blackst.*, 569; *Masters v. Barrets*, 2 *Car. & K.*, 715; *Plets v. Johnson*, 3 *Hill*, 112.

(d) A variance of one month in the time of a note described, was disregarded in *Trowbridge v. Didier* (4 *Duer*, 448), as immaterial, the defendant not having been misled. Where no time of payment is named, the note is due immediately (*Thomson v. Ketcham*, 8 *Johns.*, 189; *Gaylord v. Van Loan*, 15 *Wend.*, 308; *Peets v. Bratt*, 6 *Barb.*, 662); and interest runs from date, and without demand. On such a note a count stating no time of payment is good. *Herrick v. Bennett*, 8 *Johns.*, 374.

(e) No consideration need be averred; for every note within the statute im-

ports a consideration. *Bank of Troy v. Topping*, 13 *Wend.*, 557; *Goshen Turnpike Co. v. Hurtin*, 9 *Johns.*, 217; *Conroy v. Warrex*, 3 *Johns. Cas.*, 259; *Prindle v. Caruthers*, 15 *N. Y.*, 425.

Where the complaint on a promissory note shows that by agreement of the parties its payment was made conditional upon the payment, by the payee, of a certain debt of the payor, such payment is a condition precedent to plaintiff's right to recover on the note, and must be averred in the complaint to have been made. *Rogers v. Cody*, 8 *Cal.*, 324.

It is unnecessary to insert here, "that the plaintiff is the lawful owner and holder of said note," for the facts before stated show his title, by averring that it is payable to him. Such allegation is equally unnecessary where the complaint is by an indorsee, and alleges that the note was indorsed to him by the payee. *Benson v. Couchman*, 1 *Code R.*, 119; *Appleby v. Elkins*, 2 *Sandf.*, 673; *S. C.*, 2 *Code R.*, 80; *Taylor v. Corbiere*, 8 *How. Fr.*, 385; *Loomis v. Dorshimer*, *Id.*, 9; *Bank of Lowville v. Edwards*, 11 *Id.*, 216; *Peets v. Bratt*, 6 *Barb.*, 663; *Ohio Life Ins. & Trust Co. v. Goodin*, 1 *Handy*, 31; *Niblo v. Harrison*, 7 *Abbotts' Fr.*, 447. And when the plaintiff's title is shown in such a way, a denial of the additional allegation, that he is the lawful owner and holder, is frivolous. *Catlin v. Gunter*, 1 *Duer*, 253, and cases there cited; *Fleury v. Roget*, 5 *Sandf.*, 646.

## Complaints, against Maker of Notes.

II. That no part of said note has been paid (*f*) [except the sum of, &c.] (*g*)

290. *On Two Notes, one being Partly Paid.*

*First.* For a first cause of action. (*h*)

I. That heretofore the defendant made his promissory note in writing [*continue as in Form 289, from the \**]. (*i*)

II. That no part thereof has been paid, except the sum of dollars.

*Second.* For a second cause of action.

I. That heretofore the defendant made his other promissory note in writing [*continue as above*].

II. That no part thereof has been paid.

Wherefore the plaintiff demands judgment against the defendant for the sum of [*aggregate principal*], with interest on            dollars thereof from the            day of            , and

(*f*) At common law, if it appeared from the declaration that the note was not yet payable, a demurrer would lie. *Waring v. Yates*, 10 *Johns.*, 119; *Lowry v. Lawrence*, 1 *Cal.*, 69. Under the Code it is not necessary that the complaint allege that the time for payment has elapsed. *Peets v. Bratt*, 6 *Barb.*, 662; *Maynard v. Talcott*, 11 *Id.*, 569; *Smith v. Holmes*, 19 *N. Y.*, 271; *Keteltas v. Myers*, *Id.*, 231.

As against the maker of a note, payable on demand, no demand before suit is necessary. *Haxton v. Bishop*, 3 *Wend.*, 13.

It makes no difference that the note is made payable at a particular place, at a day certain; yet if the maker was ready to pay at the time and place, he may plead that, as he would a tender, in bar of damages and costs, bringing the money into court. *Wolcott v. Van Santvoord*, 17 *Johns.*, 248; *Caldwell v. Cassidy*, 8 *Cow.*, 271; *Troy City Bank v. Grant*, *Hill & D. Supp.*, 119; *Haxton v. Bishop*, 3 *Wend.*, 13. So, also, of a bill of exchange, as against the acceptor thereof. *Foden v. Sharp*, 4 *Johns.*,

183; *Wolcott v. Santvoord*, 17 *Id.*, 248; *Green v. Goings*, 7 *Barb.*, 652; 17 *Mass.*, 389; *Gay v. Paine*, 5 *How. Pr.*, 107; *Wallace v. McConnell*, 13 *Pet.*, 136.

On a note made in another State, and bearing higher interest than is lawful by the law of the forum, the foreign statute need not be pleaded, for the court may presume that the common law, by which any rate of interest is lawful, prevails in the law of the place of the contract. *Buckinghouse v. Gregg*, 19 *Ind. (Kerr)*, 401.

(*g*) It is not necessary to add an averment that the defendant is indebted, &c. *Connecticut Bank v. Smith*, 9 *Abbotts' Pr.*, 168.

(*h*) Several notes are several causes of action, and must be separately stated. *Van Namee v. Peoble*, 9 *How. Pr.*, 198; *Dorman v. Kellam*, 4 *Abbotts' Pr.*, 202. The contrary is held in Iowa. *Merritt v. Nihart*, 11 *Iowa*, 57.

(*i*) If preferred, a copy of the note may be set out as in Form 285, by continuing as in that form from the \* to the †.

## On Promissory Notes.

with interest on                      dollars thereof from the                      day  
of                      .

291. *On several Notes given upon an Agreement to pay All  
upon a Default in Any. (j)*

I. That upon the                      day of                      , 18                      , the defendants were indebted to the plaintiffs in the sum of                      dollars.

II. That to secure the payment of that sum the defendants agreed to deliver, and did make and deliver to the plaintiffs their promissory notes in writing, of which copies are hereto annexed.

III. That at the same time the defendants agreed with the plaintiffs in writing that in case of any default of the payment of any of the said notes at any time when the same should become due and payable, the whole amount of the said sum of                      dollars and interest, then remaining unpaid, should forthwith, at the option of the plaintiffs, become at once due and payable.

IV. That the defendant has made default in the payment of the first of said notes which became due and payable on the day of                      , and no part thereof has been paid.

292. *On a Note signed by an Agent.*

I. That heretofore the defendant, by one M. N., his agent (*k*)

(*j*) This form is supported by *Brown v. Southern Michigan R. R. Co.*, 6 *Abbotts' Pr.*, 287. The action is rather upon the special agreement than on the note, but the consideration and origin of the indebtedness need not be stated.

(*k*) The question often arises, whether an act done by an agent should be pleaded as the act of the principal, or whether the agency should be stated. Where the pleading shows, by setting out a copy of the instrument, that the act was by an agent, his authority should be averred. *McCullough v. Moss*, 5 *Den.*, 567. In other cases the pleader

has often his election to state the act in either way.

It has been held, that in the common counts it is not necessary to state that the defendants acted by an agent, but that an averment that the act was the act of the defendants would be supported by proof of the act of their agent. *Sherman v. N. Y. Central R. R. Co.*, 22 *Barb.*, 239. The case of *Dollner v. Gibson* (3 *Code R.*, 153), in which the words in the complaint showing the agency by which the defendant acted were struck out on motion, as setting forth, not a pleadable fact, but mere evidence, was reversed on appeal.

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 Complaints on Note made by Agent;—by Partners.
 

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[or, his attorney in fact], duly authorized (2) thereto, made his promissory note in writing, dated on the            day of            , at            ; and thereby promised to pay to the plaintiff [or his order],            dollars,            months after said date [or, on the            day of            ].

II. That no part thereof has been paid [except the sum of, &c.]

### 293. On a Note made by Partners.

I. That heretofore the defendants, under their firm-name of Y. Z. & Co., (m) made their promissory note in writing, dated

In *St. John v. Griffith* (1 *Abbotts' Pr.*, 39), a motion to strike out an averment that the defendant acted by his agent was denied, on the ground that it was a fact necessary to be stated. *Ives v. Humphreys* (1 *E. D. Smith*, 196) was an action of trespass, where two of the defendants actually committed the act, and a third defendant instigated and employed them to do it; and the statement of the fact in that form was deemed to be more proper than would have been an averment that all of the defendants entered, &c.

In *Bennett v. Judson* (21 *N. Y.*, 238) it was held that fraud committed through an agent is well stated in pleading as that of the principal; or if this were otherwise, and it appeared at the trial to be that of an agent without any participation of his principal, the variance would be subject of amendment, and should be disregarded upon appeal. See, also, *Curtis v. Fay*, 37 *Barb.*, 64. That it is the better practice to state the fact that the defendant acted by an agent, see, also, 2 *Chit. Pl.*, 117; 1 *Wentw.*, 345.

(2) The ratification by a principal, of an unauthorized act of an agent, has a retroactive efficacy, and being equivalent to an original authority, an allegation of due authority is sustained by proof of such ratification. *Hoyt v. Thompson*, 19 *N. Y.*, 207.

(m) An indorsement or signature of a note, in the name of a firm, by a partner, may be alleged as made by the firm. It is sufficient to set forth a writing according to its legal effect. *Manhattan Co. v. Ledyard*, 1 *Cal.*, 192; *S. C.*, *Col. & C. Cas.*, 226; *Vallett v. Parker*, 6 *Wend.*, 615; and see *Bass v. Clive*, 4 *Campb.*, 78.

So, also, of joint makers not alleged to be partners. (2 *Camp.*, 305.) *Mack v. Spencer*, 4 *Wend.*, 411.

Otherwise, if the allegation be "their own proper hands, and names being thereunto subscribed." *Pease v. Morgan*, 7 *Johns.*, 468.

So, also, under a declaration that of three defendants, two were partners, and that the defendants made a note, their own proper hands being thereunto subscribed, plaintiff may recover on proof that one of the partners signed the firm-name, and the other defendant his own. *Porter v. Cumings*, 7 *Wend.*, 172.

In an action against one M. as the maker, and others as indorsers, of a promissory note, a complaint which set forth a copy of a note signed M. & Co., upon which it alleged the defendants were indebted, &c., was held bad on demurrer, as showing a partnership note as a cause of action against an individual. If there was no real firm, it should have been alleged that the



## On Notes made by Partners.

on the       day of       , at       ; and thereby promised to pay to the plaintiff [or his order]       dollars,       months after said date [or, on the       day of       ].

II. That no part thereof has been paid [except the sum of, &c.]

294. *On the Same ; Another Form, averring Partnership of the Makers. (n)*

I. That at the time of the making of the note hereinafter mentioned the defendants were partners doing business at       , under the firm-name of Y. Z. & Co.

II. That on the       day of       , the defendants, under said firm-name, (o) made their promissory note in writing, dated on that day, at       ; and thereby promised to pay the plaintiff [or his order]       dollars,       months after said date [or, on the       day of       ].

III. That no part thereof has been paid [except the sum of, &c.]

295. *By Partners, (p) on a Note payable to the Order of their Firm-name.*

I. That heretofore the defendant made his promissory note in writing, dated on the       day of       , at       ; and thereby promised to pay to these plaintiffs under their firm-name (q)

note was signed by M., in the name of M. & Co. This objection is not strictly for defect of parties, but that the complaint does not, on its face, show an individual liability on the part of M. Price v. McClave, 6 Duer, 544; affirming S. C., 5 Id., 670; 3 Abbotts' Pr., 253.

(n) Where the fact of partnership is likely to be drawn in question, it will sometimes be better to aver the fact distinctly. See Oechs v. Cook, 3 Duer, 161. The averment of copartnership is immaterial, unless the defendant denies the execution of the note. Whitwell v. Thomas, 9 Cal., 499. A mere denial of the act is not a denial of the

partnership. Anable v. Steam-Engine Co., 16 Abbotts' Pr., 286.

(o) Where a partnership between the makers is averred, it would be sufficient to state that the said firm made the note. Manhattan Co. v. Ledyard, 1 Cal., 192; S. C., Col. & C. Cas, 236 See note (m), supra.

(p) Under the Code, a dormant partner is a necessary co-plaintiff. Secor v. Keller, 4 Duer, 416. Otherwise before: Ib.; and Clark v. Miller, 4 Wend., 628. And it is otherwise of a special partner under the statute. 2 Rev. Stat., 175, § 14.

(q) The plaintiffs must show themselves to be the persons composing the

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 Complaints on Notes Payable to a Firm.
 

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of A. B. & Co. [or their order],                      dollars,                      months  
after said date [or, on the                      day of                      ].

II. That no part thereof has been paid [except the sum of, &c.]

296. *By a Surviving Partner, (r) on a Note payable to the Order of his Late Firm.*

I. That, at the time of the making of the note hereinafter mentioned, the plaintiff and one C. D. were partners, doing business under the firm-name of A. B. & Co.

II. That on the                      day of                      , 18                      , at                      , the defendant made his promissory note in writing, dated on that day; and thereby promised to pay to them, under their said firm-name [or their order],                      dollars,                      months after said date [or, on the                      day of                      ].

III. That no part thereof has been paid [except the sum of, &c.]

IV. That on the                      day of                      , 18                      , at                      , said C. D. died, leaving the plaintiff the sole surviving partner of said firm. (s)

297. *By Payee against Surviving Maker.*

I. That at the time of the making of the note hereinafter mentioned, the defendant and one W. X. were partners, doing business under the firm-name of Y. Z. & Co.

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firm. *McGregor v. Cleveland*, 5 *Wend.*, 475; *Ord v. Portal*, 3 *Camp.*, 239, *note*; but see *Wardell v. Pinney*, 1 *Wend.*, 217.

A distinct averment of the fact of partnership between the plaintiffs, is only necessary when their right of action depends upon the partnership. When a joint ownership or joint contract will enable them to recover, it is no objection to their complaint that their partnership is not pleaded. *Loper v. Welch*, 3 *Duer*, 644; and see *Oechs v. Cook*, *Id.*, 161.

(r) The surviving partner may sue in his own name on a debt contracted

with his firm before his copartner's decease. *Bernard v. Wilcox*, 2 *Johns. Cas.*, 374, and cases there cited.

(s) In an action by a surviving partner, on a chose in action which was of the partnership, the death of the deceased partner and the plaintiff's survivorship must be stated. *Holmes v. De Camp*, 1 *Johns.*, 34; *Jell v. Douglass*, 4 *Barnw. & A.*, 374; *S. C.*, 6 *Eng. Com. L. R.*, 451. But otherwise if the note were originally made to or the account stated by the survivor, although the consideration proceeded from the partnership. *Ib.*; *S. P.*, *White v. Joy*, 13 *N. Y.* (3 *Kern.*), 83.

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On Note Payable to Receiver ;—to Corporation.

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II. That on the            day of            , 18    , at            , they made, under their said firm-name, their promissory note in writing, dated on that day; and thereby promised to pay to the plaintiff [or his order],            dollars,            months after said date [*or*, on the            day of            ].

III. That no part thereof has been paid [except the sum of, &c.]

IV. That on the            day of            , 18    , at            , said W. X. died, leaving the defendant the sole surviving partner of said firm.

298. *By a Receiver, Payee, against Partners, Makers. (t)*

I. That heretofore the defendants, under their firm-name of Y. Z. & Co., made their promissory note in writing, dated on that day; and thereby promised to pay to the plaintiff, as such receiver (*u*) [or his order],            dollars,            months after said date [*or*, on the            day of            ].

II. That no part of the same has been paid [except the sum of, &c.]

299. *By a Manufacturing Corporation formed under the General Act, Payees, against a Foreign Corporation, Makers.*

I. That the plaintiffs are a corporation created by and under the laws of this State, organized pursuant to an act of the Legislature entitled "An Act to authorize the formation of Corporations for Manufacturing, Mining, Mechanical, and Chemical purposes," passed February 17th, 1848, and the acts amending the same. (*v*)

II. That the defendants are a corporation duly chartered by

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(*t*) This form is supported by *White v. Joy*, 13 *N. Y.* (3 *Kern.*), 83.

(*u*) The act should be averred as that of the party as such receiver, &c. *Merritt v. Seaman*, 6 *N. Y.* (2 *Seld.*), 168, and cases there cited. This clause was contained in the complaint in *Smith v. Levinus*, 8 *N. Y.* (4 *Seld.*), 472; and see *Gould v. Glass*, 19 *Barb.*, 179; *Sheldon v. Hoy*, 11 *How. Pr.*, 11. Where, however, the plaintiff's charac-

ter is once sufficiently stated, the word plaintiff in subsequent parts of the pleading requires no addition of the description.

(*v*) This form of averment is supported by *N. Y. Floating Derrick Co. v. N. J. Oil Co.*, 3 *Duer*, 648; *Oswego & Syracuse Plank-road Co. v. Rust*, 5 *How. Pr.*, 390. It is not, however, necessary in the case of a domestic corporation plaintiff.

## Complaint on Insurance Note.

and under the laws of the State of New Jersey, and pursuant to an act of the Legislature of said State entitled [*title of the act*], passed [*date of enactment*]. (*w*)

III. That on the                      day of                      , 18                      , at                      , the defendants, being such corporation, by their agent duly authorized thereto, made (*x*) their promissory note in writing, dated on that day; and thereby promised to pay to the plaintiffs (*y*) [*continue as in Form 289*].

300. *By an Insurance Company, on a Deposit Note.* (*z*)

I. That the plaintiffs are a Mutual Insurance Company, duly organized under and pursuant to an act of the Legislature of this State, entitled                      , and passed on the                      day of                      , and the acts amending the same.

II. That on the                      day of                      , at                      , the defendant

(*w*) This form of averment is supported by the Mutual Benefit Life Ins. Co. v. Davis, 12 *N. Y.* (2 *Kern.*), 569; *N. Y. Floating Derrick Co. v. N. J. Oil Co.*, 3 *Duer*, 648.

(*x*) In the absence of any prohibitory statute, a corporation may give a note for a debt contracted in the course of its legitimate business, although not specially authorized by statute to make promissory notes. *Mott v. Hicks*, 1 *Cow.*, 513; and see page 532, and cases there cited. *Moss v. Oakley*, 2 *Hill*, 265; *Attorney-general v. Life & Fire Ins. Co.*, 9 *Paige*, 470; *Kelly v. Mayor, &c.*, of Brooklyn, 4 *Hill*, 263; *McCullough v. Moss*, 5 *Den.*, 567. And where there is nothing on the face of the note to show that it was issued contrary to law, or to raise a suspicion that the consideration or the purpose was illegal, the presumption is that it was given for a lawful purpose. *Safford v. Wyckoff*, 4 *Hill*, 442; *Barker v. Mechanics' Fire Ins. Co.*, 3 *Wend.*, 94; 1 *Rev. Stat.*, 768, § 3. It was said, in *Mechanics' Banking Association v. Spring Valley Shot and Lead Co.*, 13 *How. Pr.*, 227, that it must be fur-

ther alleged that the note was transferred in the ordinary course of business. But by the weight of authorities as well as by general principles, the making of the note having been proved, the presumption would be in favor of its validity, and the burden of proof would be on the defendants to show the contrary (see the cases above cited). The power of the corporation being general, if the defendants' case is an exception, it rests with them to plead the fact. It is, moreover, a fact which lies more particularly within their knowledge. And it is settled in the *N. Y. Superior Court* that a complaint in the above form is sufficient. *N. Y. Floating Derrick Co. v. N. J. Oil Co.*, 3 *Duer*, 648. If the pleader desires, he may insert at (*x*), "to these plaintiffs in the course of the legitimate business of said defendants, as by law they had power to do, their promissory note," &c.

(*y*) *Prima facie*, a corporation has power to take a promissory note. *Mutual Benefit Life Ins. Co. v. Davis*, 12 *N. Y.* (2 *Kern.*), 569.

(*z*) For a complaint by the receiver of a company, see Form 319.

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On Note Payable after Sight. Mistake in Date.

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made his promissory note in writing, dated on that day; and thereby promised to pay to the plaintiffs the sum of        dollars, in such portions, or at such time or times as the directors should, agreeably to their charter and by-laws, require.

III. That the plaintiffs by their directors, agreeably to the said charter and to the by-laws of the corporation, on the day of       , at       , required the defendant to pay the sum of        dollars, a portion of said note, on the        day of       . (a)

[Or, III. That the plaintiffs have duly performed all the conditions thereof on their part, by requiring the defendant to pay the sum of        dollars, on the        day of       .

IV. That no part thereof has been paid [except the sum of, &c.]

301. *On a Note payable at a Certain Time after Sight.*

I. [*Allege the note as in preceding forms.*]

II. That on the        day of       , 18       , at       , said note was duly presented to the defendant [*maker*], with notice that payment was required according to the terms thereof. (b)

III. [*Allege non-payment, as in preceding forms.*]

302. *On a Note Wrongly Dated.* (c)

I. That on the        day of       , 18       , the defendant made his promissory note in writing, bearing date, by mistake, on the        day of       , 18       , whereas, in truth, it was intended to bear date on said        day of       , 18       , and thereby

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(a) In an action upon a "premium note" given, since the act of 1853 took effect, to a mutual insurance company, assessment or apportionment is a condition precedent, necessary to be averred in the complaint and proved on the trial. *Devendorf v. Beardsley*, 23 *Barb.*, 656; *Williams v. Babcock*, 25 *Id.*, 109; *Hurlbut v. Root*, 12 *How. Pr.*, 511. See *Williams v. Lakey*, 15 *Id.*, 206. It should be averred that the assessment ordered by the directors was ordered agreeably to the act and by-laws, and

the time when it was ordered to be paid should be stated. *Atlantic, &c., Ins. Co. v. Young*, 38 *N. H.*, 451. It would be better to state the facts, showing that the assessment was regular according to the statute relied on; or to plead the same as a condition precedent, according to section 162 of the Code, as in the paragraph in brackets.

(b) In a note payable at a certain time after sight, "sight" is a condition precedent. See 2 *Chit. Pl.*, 134.

(c) See 2 *Chit. Pl.*, 117.

## Complaints by Indorsees of Notes.

promised to pay the plaintiff [or his order],                      dollars,  
days after said [*intended date*].

II. That no part thereof has been paid [except the sum of, &c.]

## II. INDORSEE AGAINST MAKER.

303. *By First Indorsee. Ordinary form, (d) pleading the Legal Effect.*

I. That heretofore the defendant [*maker*] made his promissory note in writing, dated on the                      day of                      , at                      ; and thereby promised to pay to the order of one M. N., (*e*)                      dollars,                      months after said date [*or, on the day of*                      .].

II. That said M. N. (*e*) thereafter [and before its maturity] (*f*) indorsed (*g*) it to the plaintiff (*h*) [for value]. (*j*)

III. That no part thereof has been paid [except the sum of, &c.]

(*d*) For a short form, see Form 285.

(*e*) If the payees are a partnership, it is enough here to designate them by the firm-name.

Where the plaintiff's title to the note is deduced through a firm, the names of the members of the firm need not be set out unless they are defendants. It is sufficient in such cases to allege, generally, that M. N. & Co. indorsed it. *Cochrane v. Scott*, 3 *Wend.*, 229; *Bacon v. Cook*, 1 *Sandf.*, 77.

An allegation that a corporation indorsed and transferred and delivered to the plaintiffs the note sued on, sufficiently implies that the transfer was made pursuant to a resolution of the board of directors, if such resolution is necessary; for the allegation is not true if the transfer was, not made by the proper officer, and according to law. So an allegation, that after the transfer the company became insolvent and was dissolved, is an indirect statement that it was solvent when the transfer was made. *Nelson v. Eaton*, 15 *How. Pr.*, 305.

(*f*) The words "before its maturi-

ty," and "for value," are not material to the cause of action, and the only reason for inserting them can be that in some cases they might, perhaps, be deemed necessary to render the complaint sufficiently definite and certain.

Unless the contrary is shown, the indorsement will be presumed to have been made before maturity. *Pinkerton v. Bailey*, 8 *Wend.*, 600; *Pratt v. Adams*, 7 *Paige*, 615; *Nelson v. Cowing*, 6 *Hill*, 336; *Case v. Mechanics' Banking Association*, 4 *N. Y. (4 Comst.)*, 166; and see *James v. Chalmers*, 6 *N. Y (2 Seld.)*, 209.

The indorsement, as well as the making of a note, imports a consideration: and before the Code it was held that no consideration need be alleged in pleading. *Hughes v. Wheeler*, 8 *Cow.*, 77; *Cruiger v. Armstrong*, 3 *Johns. Cas.*, 5; *Conroy v. Warren*, *Id.*, 259; *Safford v. Wyckoff*, 4 *Hill*, 442; *Nelson v. Cowing*, 6 *Id.*, 336; *Wheeler v. Guild*, 20 *Pick.*, 550; *Collins v. Martin*, 1 *Bos. & P.*, 648; *Ogden v. Saunders*, 12 *Wheat.*, 213, and see 341; *Appleby v. Elkins*, 2 *Sandf.*, 673; *S. C.*, 2 *Code R.*, 80.

## On Promissory Notes.

304. *Second or Later Indorsee against Maker.*

I. That heretofore the defendant [*maker*] made his promissory note in writing, dated on the            day of           , at           ; and thereby promised to pay to the order of M. N. & Co.            dollars,            days after said date [*or*, on the            day of           ].

II. That said [*payee*] thereafter indorsed it, and delivered it so indorsed; and thereafter [and before maturity] (*i*) the same was indorsed [*or*, passed] (*j*) to the plaintiff [for value]. (*i*)

A consideration for the indorsement is not necessary, except to charge the indorser, and therefore an averment of value here is immaterial.

As, however, the time and the consideration of the transfer are facts within the plaintiff's knowledge, and cannot be presumed to be within the knowledge of the maker, the defendant, a complaint in this form, but omitting to show whether the transfer was before or after maturity or for value or not, might be considered to be not sufficiently definite and certain. The latter clause of section 162 may be thought to control the question where a copy is set out; but, apart from that, it would seem that the defendant has a right to be apprised of "the precise nature of the charge," with sufficient detail to know whether his equities against the former holder are available as a defence. This question does not appear to have been raised.

The phrase, in a declaration on a note, that the plaintiff received it "before maturity, *bona fide*, and in due course of trade," means that he took it for value. *Miller v. Mayfield*, 37 *Miss.* (8 *George*), 688.

(*g*) An averment that a note was indorsed to A., imports delivery to him. *Bank of Lowville v. Edwards*, 11 *How. Pr.*, 216; *Appleby v. Elkins*, 2 *Sandf.*, 673; *N. Y. Marbled Iron Works v. Smith*, 4 *Duer*, 362; *Griswold v. Loverly*, 3 *Id.*, 690; *S. C.*, 12 *N. Y. Leg. Obs.*,

316; *Burrall v. De Groot*, 5 *Duer*, 379; *Marston v. Allen*, 8 *Mees. & W.*, 404, and cases there cited; and see *Purdy v. Vermilya*, 8 *N. Y.* (4 *Seld.*), 346; *Chit. on Bills, Forms*, 553, 554.

(*h*) On a note payable to a third person, plaintiff must set forth by what right he claims it. *Montague v. Reineger*, 11 *Iowa*, 503; *Bennett v. Crowell*, 7 *Minn.*, 385.

When the complaint alleges that the defendant gave the note to the payee, who indorsed and delivered it to the plaintiff, and the answer does not deny this allegation, the defendant cannot prove that the payee had no capacity to transfer, and thus indirectly convert the transfer. *Robbins v. Richardson*, 2 *Bosw.*, 248.

(*i*) As to the necessity of the phrases "before maturity" or "for value," see note (*f*), *supra*. It is sufficient to say, that "the same came lawfully to the possession of the plaintiff for value." *Phelps v. Ferguson*, 9 *Abbotts' Pr.*, 206; *Lee v. Ainslee*, 1 *Hill.*, 277; *S. C.*, 4 *Abbotts' Pr.*, 463.

(*j*) The word "indorsed" is not essential. Alleging that it was passed to the plaintiff is sufficient. *Price v. McClave*, 6 *Duer*, 544. So "transferred" is sufficient. *Taylor v. Corbiere*, 8 *How. Pr.*, 385. It was, however, held in *Montague v. King*, 37 *Miss.* (8 *George*), 441, that the term "transfer" in a declaration, when applied to notes, implies a passing of the beneficial interest, but not necessarily of the legal title.

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Indorsement of Note and Transfer to Plaintiff.

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Or, (k) II. That said [payee] thereafter indorsed it, and delivered it so indorsed, and the plaintiff thereafter [and before maturity] became, and now is the owner (l) thereof for value.

III. That no part thereof has been paid [except the sum of, &c.]

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(k) Either of these allegations is sufficient without the other. The complaint is not bad upon demurrer for omitting to aver a transfer to the plaintiff, if it avers indorsement by the payee, and that the plaintiff is the owner. It seems now to be settled that an allegation of ownership is not to be deemed a mere conclusion of law, but is an allegation of a fact.

So, also, if it sets forth the transfers to him, it need not also allege that he is the owner. *Mitchell v. Hyde*, 12 *How. Pr.*, 460; *Connecticut Bank v. Smith*, 17 *Id.*, 487; *S. C.*, more fully, 9 *Abbotts' Pr.*, 168.

The earlier cases under the Code, laid down more technical rules, some of them holding that the complaint must trace the plaintiff's title by setting out the successive indorsements. 10 *How. Pr.*, 233; *Id.*, 33; 12 *Id.*, 321. But it is clear that he can only be required to plead that which he is required to prove. He must prove that the note was made by the defendant, and that he became the owner of it before suit brought. The production of the note on the trial indorsed to him or in blank, proves, by a legal presumption, that he became the owner for value, and before maturity. *Smith v. Schanck*, 18 *Barb.*, 344; *James v. Chalmers*, 6 *N. Y. (2 Seld.)*, 209. And evidence on the part of the defendant that the note was a lost or stolen note, merely rebuts this presumption, and calls on the plaintiff for nothing more than direct evidence that he took the note in good faith and for value. *Mills v. Barber*, 1 *Mees. & W.*, 425; *De La Chaumette v. Bank of England*, 9 *Barnw. & C.*, 208; *King v.*

*Milsom*, 2 *Campb.*, 5; *Miller v. Race*, 1 *Burr.*, 452; *Grant v. Vaughan*, 3 *Id.*, 1516; *Peacock v. Rhodes*, 2 *Dougl.*, 633; *Micklethwaite v. Thebaud*, 4 *Sandf.*, 97; and see *Catlin v. Hansen*, 1 *Duer*, 309; *Rochester v. Taylor*, 23 *Barb.*, 18. And evidence that the plaintiff took the note after maturity does not rebut the presumption that he paid value for it. *James v. Chalmers*, 6 *N. Y. (2 Seld.)*, 209. And the plaintiff is not bound to prove the genuineness of intermediate indorsements. *Pentz v. Winterbottom*, 5 *Den.*, 51. It is clear, then, on general principles, that the complaint on a negotiable note, even if not drawn under section 162 of the Code, need not trace the indorsements. It is sufficient to aver distinctly the plaintiff's ownership. And the authorities maintain this view. *Taylor v. Corbiere*, 8 *How. Pr.*, 385; *Benson v. Couchman*, 1 *Code R.*, 119; *Loomis v. Dorshimer*, 8 *How. Pr.*, 9; *Mitchell v. Hyde*, 12 *Id.*, 640; *Griswold v. Loverty*, 3 *Duer*, 690; *S. C.*, 12 *N. Y. Leg. Obs.* 316; *N. Y. Marbled Iron Works v. Smith*, 4 *Duer*, 362; *Lee v. Ainslee*, 4 *Abbotts' Pr.*, 463. See, also, *Critchlow v. Parry*, 2 *Campb.*, 182; *Lambert v. Pack*, 1 *Salk.*, 127; *Dean v. Hewit*, 5 *Wend.*, 257.

(l) The averment that the plaintiff is the owner, is sufficient, without adding that he is the holder. *Rollins v. Forbes*, 10 *Cal.*, 299. An averment that "he is the lawful holder," without the word "owner" or an equivalent term, might be sufficient. *Lee v. Ainslee*, 1 *Hilt.*, 277; *S. C.*, 4 *Abbotts' Pr.*, 463; *Benson v. Couchman*, 1 *Code R.*, 119; *Catlin v. Gunter*, 1 *Duer*, 253.



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On Promissory Notes, Payable to Bearer, &c. Against Indorser.

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305. *On a Note Payable to Bearer, or to a Fictitious Person, or to the Maker's own Order. (n)*

I. That heretofore the defendant [*maker*] made and delivered [to M. N.] his promissory note in writing, dated on the day of , at ; and thereby promised to pay to the bearer [said M. N.] dollars, months after said date [*or, on, &c.*]

II. That the same thereafter [and before maturity] came lawfully to the possession of the plaintiff [for value].

III. That no part thereof has been paid [except the sum of, &c.]

III. INDORSEE AGAINST INDORSER.

306. *First Indorsee against Payee, Indorser. Ordinary Form, pleading Legal Effect. (n)*

I. That heretofore one M. N. [*or, M. N. & Co.*] (*o*) made his [their] promissory note in writing, dated on the day of , at ; and thereby promised to pay to the defendant [*or, to the defendants, under their firm-name of Y. Z. & Co.*], [*or order*], dollars, days after said date [*or, on, &c.*]

II. That the defendant [*indorser*] [*or, the defendants, indorsers, under their said firm-name*] then and there [*or, thereafter and before this action*] indorsed (*p*) the same to the plaintiff [for value]. (*q*)

(*m*) It seems to be the general rule, that a note drawn to the maker's own order, must be indorsed by him in order to pass legal title. *Smith v. Lusher*, 5 *Cow.*, 688; *Titcomb v. Thomas*, 5 *Greenl.*, 282; *Macferson v. Thoytes*, *Peake's N. P. C.*, 20; *Bosanquet v. Anderson*, 6 *Esp. R.*, 43. But in this State it is provided by statute, that the holder and owner of such a note or draft, or of a note or draft payable to a fictitious person and negotiated by the maker, may recover against him, as if the paper were payable to bearer. 2 *Rev. Stat.*, 53; and see *Plets v. Johnson*, 3 *Hill*, 112; *Masters v. Barrel*, 2 *Carr. & P.*, 715; *S. C.*, 61 *Eng. Com. L. R.*, 714

(*n*) For a short form, see Form 285, p. 215.

(*o*) It is not necessary to state the names of the partners at large, in counting on a note made or indorsed by a copartnership, when the suit is brought against other parties. *Cochrane v. Scott*, 3 *Wend.*, 229; *Bacon v. Cook*, 1 *Sandf.*, 77.

(*p*) In an action against a corporation, as indorser of a promissory note, if the complaint alleges that the note was indorsed by the defendants, that is sufficient; as it implies that the note was lawfully indorsed by them, and the burden is thrown on the defendants, to show that it was not lawfully

## Dishonor of Note.

III. That [at maturity] said note was duly (r) presented for payment, (s) but was not paid, (t) of all which (u) due notice was given to the defendant [indorser]. (v)

done. It need not be averred in the complaint that the note was indorsed by the defendants in the course of their legitimate business. *Mechanics' Banking Association v. Spring Valley Shot & Lead Co.*, 25 *Barb.*, 419; *Nelson v. Eaton*, 15 *How. Pr.*, 305; *Andrews v. Astor Bank*, 2 *Duer*, 629; *Price v. McClave*, 6 *Id.*, 544; affirming *S. C.*, 5 *Id.*, 670; and 3 *Abbotts' Pr.*, 253.

(g) See note (f), *supra*.

(r) Under section 162 of the Code, in a complaint against indorser, on a note payable at a particular place, presentment and demand at that place is sufficiently alleged if it be averred that the note was duly presented for payment, &c. *Woodbury v. Sackrider*, 2 *Abbotts' Pr.*, 402; *Gay v. Paine*, 5 *How. Pr.*, 107; *Ferner v. Williams*, 14 *Abbotts' Pr.*, 215; *S. C.*, less fully, 37 *Barb.*, 9; and see *Wood v. Tillingham*, 1 *Handy*, 29. Compare, as to the force of the word "duly," *Polly v. Saratoga & Washington R. R. Co.*, 9 *Barb.*, 449; *People ex rel. Haws v. Walker*, 2 *Abbotts' Pr.*, 421; *People ex rel. Crane v. Ryder*, 12 *N. Y. (2 Kern.)*, 433. It seems to be conceded that it is not necessary to show by whom presentment was made, and it has been held that an allegation of presentment of a bill for payment by a certain person, does not require proof of presentment by such person. *Boehm v. Campbell*, *Gow.*, 55; *S. C.*, 5 *Eng. Com. L. R.*, 459; and see *Hunt v. Maybee*, 7 *N. Y. (3 Seld.)*, 266. Where the complaint averred that on the day the note fell due it was, "by the Bank of C., which then held the same," presented for payment, it was held that the latter was not an allegation of ownership by the Bank of C., but at most, of a deposit of the note and a holding of the same as the agent of the plaintiff. *Farmers &*

*Mechanics' Bank v. Wadsworth*, 24 *N. Y.*, 547.

(s) Formerly, evidence of facts excusing non-presentment and notice, was admissible under an averment of due demand and notice. Under the Code, if the plaintiff wishes to prove such excuse he should plead the facts constituting it. For such averments, see *Forms* 309 and 310.

An averment in a complaint against an indorser, that the note was presented to the maker and payment demanded, is proper when it was in fact presented at the last place of residence and business, from which he had then recently removed, and after diligent inquiry he could not be found so that it could be presented to him personally. *Paton v. Lent*, 4 *Duer*, 231; and see *Hine v. Alleley*, 4 *Barnw. & A.*, 624.

(t) Notarial protest is not necessary to charge the indorser upon a promissory note, nor on an inland bill of exchange. *Miller v. Hackley*, 5 *Johns.*, 375; *Coddington v. Davis*, 1 *N. Y. (1 Comst.)*, 186; *Cole v. Jessup*, 10 *How. Pr.*, 515; 1 *Parsons on Contr.*, 238; *Edwards on Bills*, 268. It is only practised as a convenient method of effecting demand and notice, and preserving proof of those facts in those States where, as in this State, it is permitted by statute.

They are facts which may be proved in other ways, and the act of protest is merely one form of evidence of those facts, and need not be pleaded. In *Turner v. Comstock* (1 *Code R.*, 102), where it was said that the complaint must show that the note was protested, the word protest was undoubtedly used in its popular sense of demand and notice of non-payment.

An averment, that "when it came due it was protested for non-payment

## Against Indorser of Promissory Note.

[Or, III. That the plaintiffs have duly performed all the conditions thereof on their part.] (w)

IV. That the cost of protest thereof was .

V. That no part thereof has been paid [except the sum of, &c.]

307. *Remote Indorsee against the Same.*

*As in preceding form, substituting for paragraph II.,* That the defendant [or, the defendants, under their firm-name of Y. Z. & Co.] then and there [or, thereafter] indorsed the same, and delivered it so indorsed; and thereafter, and before [this action], it lawfully came to the possession of the plaintiff for value.

and due notice of protest was given," is not equivalent to an averment that the note had been duly presented for payment to the maker, and that payment had been refused; and for this defect the complaint was held demurrable. *Price v. McClare*, 3 *Abbotts' Pr.*, 253. But an averment of due demand, and due protest for non-payment, was held to be sufficient averment of non-payment and notice. *Woodbury v. Sackrider*, 2 *Id.*, 402.

It seems that an averment of protest is supported by proof of a demand by one not a notary. *Hunt v. Maybee*, 7 *N. Y.* (3 *Seld.*), 266.

(u) An allegation that the note was duly presented and payment demanded, but it was not paid, and due notice of non-payment was given, &c., is insufficient. Due notice of demand, as well as of non-payment, should be alleged. *Paliquioque Bank v. Martin*, 11 *Abbotts' Pr.*, 291.

A general averment of notice of all the premises, is sufficient. *Boot v. Franklin*, 3 *Johns.*, 207.

(v) A denial that the notice of protest was received by the defendant may be stricken out of the answer of the indorser, as irrelevant. *Edgerton v. Smith*, 3 *Duer*, 614.

It is not enough that the indorser had knowledge of the non-payment:

he is entitled to notice. Where notice is material, an averment of facts "which defendant well knew," has been held not equivalent to averment of notice. *Colchester v. Brooks*, 7 *C. B.*, 339; *S. C.*, 53 *Eng. Com. L. R.*, 339.

(w) This form of averment is supported by *Butchers & Drovers' Bank v. Jacobson*, 15 *Abbotts' Pr.*, 218. The necessity of one or the other of these allegations is held, by most of the earlier cases, to be not dispensed with by pleading the note and indorsement *in hæc verba*, under section 162; the indorsement not being considered as an instrument for the payment of money only; for extrinsic facts are necessary to constitute with it a cause of action against the indorser. *Alder v. Bloomington*, 1 *Duer*, 601; *Cottrell v. Conklin*, 4 *Id.*, 45; *Price v. McClare*, 3 *Abbotts' Pr.*, 253; *Lord v. Chesebrough*, 4 *Sandf.*, 696; *Bank of Geneva v. Gulick*, 8 *How. Pr.*, 51; *Spellman v. Weider*, 5 *Id.*, 5; *Lightstone v. Laurencel*, 4 *Cal.*, 277.

The contrary view is taken in one of the opinions in *Prindle v. Caruthers*, 15 *N. Y.* (1 *Smith*), 425; reversing *S. C.*, 10 *How. Pr.*, 33; and the contrary was also held in *Roberts v. Morrison*, 11 *N. Y. Leg. Obs.*, 61; and this seems the better opinion, though not yet established as a rule of practice

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 Complaints against Indorsers. Excuses for Want of Notice.
 

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308. *Remote Indorsee against his Immediate Indorser.*

I. That heretofore M. N. [& Co.] made their promissory note in writing, dated on the            day of           , at           ; and thereby promised to pay to the order of O. P. [& Co.] dollars,            days after said date [*or, on, &c.*]

II. That the said payees then and there [*or, thereafter*] indorsed the same to the defendant [*or, indorsed the same, and delivered it so indorsed*].

III. That thereafter, and before [this action], the defendants indorsed the same to the plaintiff for value.

[*Continue as in Form 306, paragraphs III., IV., and V.*]

309. *Special Averment of Excuse for Non-presentment, (x) where the Maker Could Not be Found.*

III. That at the maturity of said note, due search and inquiry was made for said [*maker*] at [*the place of date*], (*y*) in order that the same might be duly presented to him for payment, but he could not be found, and the same was not paid; of all which due notice was given to the defendant.

310. *The Same, where the Indorser has Waived Notice. (z)*

III. That at maturity said note was duly presented for payment, but was not paid.

IV. That the defendant [*indorser*] thereafter waived the laches of the plaintiff in not giving him due notice thereof, and promised to pay said note.

(*x*) If the indorser of a note dies before it becomes due, in an action against his personal representatives, the allegation of notice, &c., must be a notice to them, and not to the deceased. *Stewart v. Eden*, 2 *Cal.*, 121.

To charge an indorser on a note on demand, if the complaint shows an unreasonable delay in demand, the facts excusing it must be averred as a part of the cause of action. *Jerome v. Stebbins*, 14 *Cal.*, 457.

(*y*) If the note was drawn payable at a particular place, and was presented there, the preceding forms averring regular demand and notice may be used. See *Taylor v. Snyder*, 3 *Den.*, 145. As to the sufficiency of this form of averment, see 2 *Chit. Pl.*, 134.

(*z*) If the waiver was before maturity, it is considered as an estoppel, operating to conclude the indorser from denying that demand was made and notice given; and it seems that evi

## In Actions against Indorsers.

311. *On a Note which is not Valid as against the Maker. (a)*

I. That the defendant indorsed to plaintiff a promissory note, made [or, purporting to have been made] by one M. N. on the day of      , 18      , at      , for the sum of      dollars, payable to the order of defendant [or, one O. P.],      days after date [and indorsed by the said O. P. to the defendant].

[Continue as in Form 306, paragraphs III., IV., and V.]

## IV. INDORSEE AGAINST MAKER AND INDORSER. (b)

312. *First Indorsee against Maker, and Payee, Indorser.*

I. That heretofore the defendant [maker] [or, the defendants, makers, under their firm-name of W. X. & Co.] made his [their] promissory note in writing, dated on the      day of      , at

dence of such a waiver would be admissible under an averment of due demand and notice. *Coddington v. Davis*, 1 *N. Y.* (1 *Comst.*), 186; and see *Holmes v. Holmes*, 9 *N. Y.* (5 *Seld.*), 525.

As to a promise made subsequent to maturity, a distinction is taken between a promise by the indorser proved as presumptive evidence of actual notice having been given him, and a promise proved as evidence of a waiver of the holder's admitted laches in not having given notice. *Tebbetts v. Dowd*, 23 *Wend.*, 379; and see 383, and cases there cited; *Miller v. Hackley*, 5 *Johns.*, 375; *Duryee v. Denison*, *Id.*, 248; *Thornton v. Wynn*, 12 *Wheat.*, 183; *Leonard v. Gary*, 10 *Wend.*, 504; *Agan v. McManus*, 11 *Johns.*, 180; *Lundie v. Robertson*, 7 *East*, 331; and see *Taylor v. Jones*, 2 *Campb.*, 105; *Dorsey v. Watson*, 14 *Missouri*, 59; *James v. O'Brien*, 26 *Eng. L. & Eq. R.*, 283; *De Wolf v. Murray*, 2 *Sandf.*, 166; *Metcalfe v. Richardson*, 73 *Eng. Com. L. R.*, 1010. A promise relied on as presumptive evidence of notice given, should not be pleaded; it is merely one form of evidence of notice as averred. But a

promise relied on as to establish a waiver of an acknowledged omission to give notice, should be pleaded.

(a) This form is from the Report or the Commissioners of the Code, p. 40, and is there recommended for use in all actions against indorsers only, on the ground that it will avoid all danger of misleading the defendant into immaterial issues; since he is estopped by his indorsement from denying the making of the note, although the maker's signature might be a forgery; and therefore the only material issue is, *whether he indorsed such a note.*

(b) "Persons severally liable upon the same obligation or instrument, including the parties to bills of exchange and promissory notes, may all or any of them be included in the same action, at the option of the plaintiff." *Code*, § 120; and see *Laws of 1832*, 489, ch. 276; *Laws of 1835*, 248, ch. 211; *Laws of 1837*, 72, ch. 93.

The assignee of non-negotiable paper cannot join maker and assignor in one action. *White v. Low*, 7 *Barb.*, 204; and see *Allen v. Fosgate*, 11 *How Pr.*, 218; *Butler v. Rawson*, 1 *Den.*,

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Complaints against Makers and Indorsers.

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; and thereby promised to pay to the order of the defendant [*indorser*] [*or, to the order of the defendants, indorsers, (c)*] under their firm-name of Y. Z. & Co.],          dollars,          days after said date [*or, on, &c.*],

[*Continue as in Form 306.*] (*d*)

313. *Remote Indorsee against Maker, First Indorser, and a Later Indorser.*

I. [*As in preceding form.*]

II. That the defendants [*naming the payees*] [under their said firm-name] indorsed the same, and delivered it so indorsed.

III. That thereafter the defendants [*naming the later indorsers*] [under their firm-name of U. V. & Co.] indorsed the same, and delivered it so indorsed, and thereafter and before its maturity it lawfully came to the possession of the plaintiff for value.

[*Continue as in Form 306, from beginning of paragraph III.*]

V. PAYEE AGAINST MAKER AND INDORSER.

314. *Payee having parted with Full Value on the Faith of the Indorsement.*

I. That on the          day of          , 18          , at          , the defendant W. X. made his promissory note in writing, dated on that day, and thereby promised to pay to the order of the plaintiff, at          , the sum of          dollars,          months after said date [*or, on, &c.*]

II. That the defendant Y. Z. indorsed said note, when said W. X. delivered the same to the plaintiff.

III. That said note at maturity was duly presented for payment, but was not paid; of all which due notice was given to the defendant Y. Z.

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105; *Tomlinson v. Willey*, 1 *How. Pr.*, 247.

For a complaint on a promissory note, in an action against a maker and a surety, see *Osgood v. Whittlesey*, 10 *Abbotts' Pr.*, 134.

(c) In an action on a note against maker and indorser the allegation that

the latter indorsed the note and transferred it to the plaintiff, is a material allegation which the former may controvert. *Flood v. Reynolds*, 13 *How. Pr.*, 112.

(d) This form is supported by *Burrall v. De Groot*, 5 *Duer*, 379; *Gilder sleeve v. Mahony*, *Id.*, 383.

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By Holders of Negotiable Paper, other than Indorsees.

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IV. That said note was made by the defendant W. X., and indorsed by the defendant Y. Z., for the purpose of paying for [coal sold and delivered by this plaintiff to the defendant W. X.], on the credit of such indorsement; that the defendant Y. Z. indorsed the same for the purpose of procuring for the said maker a credit with the plaintiff, knowing that it would be so applied, and that said note was so passed and so indorsed by the defendant with his privity, to the plaintiff, in payment for [coal then sold and delivered]. (e)

V. That no part thereof has been paid.

VI. BY TRANSFEREES OF NEGOTIABLE PAPER, NOT CLAIMING BY  
INDORSEMENT.

315. *By an Assignee of a Note.*

I. [*Plead the instrument, as in any other case.*]

II. That M. N. [*the payee*] sold and delivered said note to the plaintiff [for a valuable consideration, before it was payable]. (f)

III. [*Aver breach, as in other cases.*]

(e) This is the complaint in *Moore v. Cross* (19 N. Y., 227; affirming S. C., 23 Barb., 534), modified slightly to conform to the previous precedents, and so as to state only one note instead of two as in that case. The allegations contained in paragraph marked IV. were inserted as an amendment.

The plaintiff in such a case cannot recover unless his complaint contain special averments showing the facts relative to the transaction that may operate to charge the indorser in the payee's favor (*Bradford v. Martin*, 3 Sandf., 647); and the complaint is insufficient in this respect if it merely aver that the note, for a further inducement to the plaintiff to accept the same, was indorsed by the defendant, and was then delivered to and indorsed by the plaintiff. *Murphy v. Merchant*, 14 How. Pr., 189

(f) This form is sustained by *Billings v. Jane*, 11 Barb., 620. The rule that a bill or note payable to order must be transferred by indorsement, applied only to make the instrument negotiable, so that the holder might sue in his own name. But the transfer by delivery was sufficient to enable the holder to sue in the name of the payee. By the assignment of the note alleged, the plaintiff acquired title to the note, and the action, under the Code, could be maintained in his own name. *Savage v. Bevier*, 12 How. Pr., 166. See Code, § 111; *Hastings v. McKinley*, 1 E. D. Smith, 273.

This is the proper form of averring the assignee's title; though a mere averment that he is the owner and holder may be sufficient to admit evidence at the trial. *Brown v. Richardson*, 20 N. Y., 472.

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Complaint on Bank-note.

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316. *On a Bank-note. (g)*

I. That the defendants are a corporation, created by and under the laws of this State, organized pursuant to an act of the Legislature, entitled "An Act to authorize the Business of Banking," passed April 18, 1838, and the acts amending the same, and were such corporation so organized at the times hereinafter set forth, and that their place of business then was, and still is, in the city of New York.

II. That on the            day of           , 18   , the defendants being such corporation, by their agents duly authorized thereto, made and executed their certain promissory note in writing, bearing date on said day, whereby they promised to pay to the bearer on demand, at their place of business within this State, the sum of            dollars, and for value received delivered the same to some person unknown to this plaintiff, and loaned and circulated the same as money, according to the ordinary course of banking business as regulated by the laws and usages of this State.

III. That thereafter said promissory note was duly transferred and delivered to this plaintiff for value, and he was at the time hereinafter stated possessed of the same, and became, and was, and still is the lawful owner and holder thereof.

That on the            day of           , 18   , between the hours of ten and three o'clock, and during the usual hours of business, this plaintiff duly presented the said note to the defendants at their said place of business, and where said note was payable, and lawfully demanded the payment and redemption of said note, which the defendants then and there refused, and no part of the same has been paid.

317. *On a Negotiable Bond payable to Bearer. (h)*

I. That on the            day of           , 18   , at           , the defendants, a corporation incorporated by the laws of this State,

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(g) On a note payable to bearer it is enough for plaintiff to allege that it is his property and the amount is due to him, without setting forth how he acquired it. *Dabney v. Reed*, 12 *Iowa*, 315.

(h) This form is sustained by *Hubbard v. N. Y. & Harlem R. R. Co.*, 14



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 On Negotiable Bond.
 

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in pursuance of a resolution of their board of directors, passed on the       day of       , 18       , made and delivered their note or obligation, partly printed and partly in writing, which they signed by their president and treasurer, and affixed the seal of the company thereto, and of which note or obligation the following is a copy : [*copy of bond*].

II. That upon receipt of the sum therein mentioned, or other valuable consideration therefor, from some person unknown to the plaintiff, the defendants delivered the same to such person for the purpose and with the intent that the same should be assignable and transferable by delivery from hand to hand, without other writing.

III. That before the maturity of said note or obligation, it came lawfully into the possession of the plaintiff for value received, so that he became the owner and holder thereof, and entitled to the money therein promised to be paid.

IV. That there is now due to this plaintiff thereon, from the defendant, the sum of       dollars, with interest thereon from the       day of       , 18       .

318. *By the Treasurer of an Unincorporated Company, on a Note payable to the former Treasurer. (i)*

I. That the Forrestville Division, No. 411, Sons of Temperance, is an association (*j*) consisting of seven persons and upwards, in the town of Hanover, in this State.

*Abbotts' Pr.*, 275; S. C., less fully, 36 *Barb.*, 286. For a complaint in an action against a town on railroad bonds, see *Stairin v. Town of Genoa*, 23 *N. Y.*, 439; *Gould v. Town of Venice*, 29 *Barb.*, 442.

In an action on the bonds of a municipal corporation, a complaint is sufficient which sets out the bond, alleges that the defendants are a corporation, that they made and delivered the bond on a good consideration, that this was done under an ordinance passed by the proper agents of the defendants, having authority for that purpose, and that the defendants have failed to pay. It

is not necessary to set out the ordinance, any more than it would be to set out a power of attorney; nor to set out the vote or other proceedings of the corporate agents. If the bond set out designates the agents who executed, and the complaint avers them to be the legally constituted agents of the city, no further description of them is necessary. *Underhill v. Trustees of Sonora*, 17 *Cal.*, 172.

(*i*) This form is supported by *Tibbetts v. Blood*, 21 *Barb.*, 650.

(*j*) It is only in cases where an association, as such, are the owners, or have an interest, joint or in common,

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 Complaint by Official Successor of Payee.
 

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II. That at the time hereinafter mentioned, one C. B. was the treasurer thereof.

III. That on the            day of           , 18   , the defendants made their promissory note in writing, of which the following is a copy: [*copy of note*], and thereupon delivered the same to said B., as the treasurer of the association, who was duly authorized to receive it on their behalf.

IV. That said note was given for the benefit of the association, and that it is the property of the members thereof, and owned by them in common.

V. That this plaintiff is now the treasurer of said association, and, as such, is the lawful holder of said note on and for their behalf. (*k*)

VI. That there is now due to the plaintiff, as such treasurer, thereon, from the defendants, the sum of            dollars, with interest from, &c.

319. *By Receiver of Mutual Insurance Company on Deposit Note.* (*l*)

I. That the Union Insurance Company was a mutual insurance company, with the name of the Union Mutual Insurance Company of Fort Plain, duly formed and incorporated by virtue of an act of the Legislature of this State, entitled "An Act to provide for the Incorporation of Insurance Companies," passed April 10, 1849, and said corporation was duly organized under said act, in the year 1850, to make insurance on dwellings,

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in any property, right of action, or demand, that a suit may be maintained in the name of the association. Several individual demands accruing to all the members are not to be recovered in such an action. *Corning v. Greene*, 23 *Barb.*, 33.

An association cannot sue under this act, respecting property which they hold as agents merely, and not as owners,—*e. g.*, the engine of a fire company. *Masterson v. Botts*, 4 *Abbotts' Pr.*, 130.

(*k*) As to what will sufficiently show

that the company, and not the officer, is the party in interest, see *Camden Bank v. Rodgers*, 2 *Code R.*, 45; *S. C.*, 4 *How. Pr.*, 63, *infra*, note (*c*).

(*l*) It was held in *Thomas v. Whalton* (31 *Barb.*, 172), that the complaint in an action by the receiver of a mutual insurance company on a premium note must show the liabilities of the company. See also the cases cited, *ante* 227, note (*a*).

This form was sustained, on demurrer to an answer, in *White v. Haight*, 16 *N. Y.*, 310; *Van Santv. App.*, 386.

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By Receiver of Mutual Insurance Company.

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houses, stores, and all kinds of buildings and other property, against loss or damage by fire, and otherwise, as allowed in subdivision 2, of section 1, of the act last aforesaid, and subject to the other provisions of the said act; and policies of insurance were issued by said company upon the conditions allowed by said act, and said company carried on and conducted its business under said act, at Fort Plain, in the county of Montgomery, from the time of the formation and incorporation of the said company, under the said act, until the 8th day of July, 1851.

II. That by an act entitled "An Act to amend the charter of the Union Mutual Insurance Company at Fort Plain," which act was duly passed on the last-mentioned day, the name of the said company was amended, so as thereafter to be called and known as "The Union Insurance Company;" and thereafter said company continued to carry on its business under said two acts.

III. That on or about the 6th day of June, 1853, at a special term of the Supreme Court, held at the court-house in the county of Saratoga, on due notice, this plaintiff was appointed receiver of the stock, property, things in action, and effects of the said company [upon the occasion of its voluntary dissolution, *or otherwise*].

IV. That after the said 6th day of June, 1853, and prior to the 28th day of June, 1853, the plaintiff gave the requisite security as said receiver, and filed the same in the clerk's office of the said county of Montgomery, and entered upon the duties of his office as such receiver, and is now, as said receiver, in possession of the stock, property, things in action, and effects of the said corporation.

V. That at a special term of the Supreme Court, held at Albany, on the 28th day of June, 1853, it was ordered and adjudged by said court that the said Union Insurance Company had become insolvent and unable to pay its debts, and had forfeited its corporate rights and privileges; and by judgment of said court, said corporation was perpetually enjoined and restrained from exercising any of the corporate rights, privileges, and franchises of the said Union Insurance Company, and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering any of the property or effects of the said corporation; and the stock, property, things

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Complaint by Receiver of Insurance Company.

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in action, claims, funds, and effects of the said Union Insurance Company were by said judgment sequestered; and the plaintiff was confirmed in his said office and trust as receiver, to take charge of the property and effects of the said corporation, and to collect, sue for, and recover the debts and demands that may be due, and the property that may belong to said corporation, with the power and authority conferred, and subject to all the duties and obligations imposed in and by article 3, title 4, of chapter 8, of part 3, of the Revised Statutes.

VI. That the plaintiff did, by order of the said court, made at the court-house in Schoharie county on the 15th day of May, 1854, settle and determine the sum to be paid by the several members of the said company on their premium notes [deposit notes] as their respective portions for the losses and liabilities of said company.

VII. That the defendant, as plaintiff is informed and believes, made his certain note in writing, commonly called a premium or deposit note; and, at the date in said note mentioned, delivered the said note to the said Union Insurance Company, of which the following is a copy : [*copy note*].

VIII. That said policy of insurance expired in one year from the date thereof, which said note formed part of the capital stock of said company, and which said policy of insurance was issued and delivered to the said defendant at the date mentioned in the said note, and thereby the said defendant became a member of said company, down to and including the time for which said note was assessed by said plaintiff, as said receiver, to pay the losses and liabilities of said company, incurred whilst said policy and note were in full force and effect.

IX. That after he had entered on the duties as said receiver, he ascertained the amount of the losses by fire, and other liabilities of said company; and as said receiver, at Fort Plain aforesaid, on the 20th day of June, 1854, did settle and determine the sums to be paid by the several members of the said company, as their respective portions of such losses and liabilities, in proportion to the unpaid amount of his or their deposit note or notes, agreeably to the charter and by-laws of said company, and did therefor assess the sum so settled and determined upon to be paid by the several members of said company, liable to be assessed therefor.

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On Note given by Member of Insurance Company.

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X. That after the making of the said assessment, as said receiver, he published notice thereof in the "Mohawk Valley Register," a newspaper published in the county of Montgomery, once in each week for thirty days, commencing on the 6th day of July, 1854; and that previous to the 2d day of August, 1854, he caused notice to be served on each person assessed, of the amount so settled, determined, and assessed to be paid by him on his premium or deposit note, requiring said assessment to be paid in thirty days after the service of such notice, by depositing such notice in the post-office at Fort Plain, directed to each person assessed at his place of residence, as far as such place of residence could be ascertained from the books of said company.

XI. That at a special term of the Supreme Court, held at the court-house in the county of Saratoga, on the 2d day of October, 1854, the aforesaid assessment, so made by said receiver on the premium notes [deposit notes] of the members of said company was ratified and confirmed, and the said receiver authorized and directed by said court to bring suits against the several members of said company, upon their premium notes [deposit notes], who have refused or neglected to make payment of the amount so assessed by plaintiff to be paid on their respective premium notes [deposit notes].

XII. That the said defendant's note aforesaid was assessed, for the purpose aforesaid, to the amount of \$75, and said assessment was made for losses or damages by fire and expenses accrued to said company only whilst said note and policy of insurance therein mentioned were in full force and effect, which said assessment was made on said 20th day of June, 1854, and thereby the said defendant was required to pay said assessment, of which assessment the defendant had due notice.

XIII. That after the assessment, made by him as aforesaid, he ascertained that said assessment would not pay the losses and liabilities of said company, and that the amount chargeable upon each of said notes by force of the statute, charter, and by-laws of said company, was to the entire amount of each of the said notes.

XIV. That the Supreme Court, at a special term, held at the court-house, Cooperstown, in the county of Otsego, on the first Tuesday of July, 1856, ordered that the said plaintiff, as said

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 Complaints on Bills of Exchange.
 

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receiver, be, and was thereby authorized and directed to assess all the premium notes of said company to the entire amount due on each of them, and file his certificate of assessment in the office of the clerk of the county of Montgomery; which order further directed, that if default should be made in the payment of said assessment for thirty days after so filing the certificate, the said plaintiff, as such receiver, be authorized and directed to bring suits for the entire balance due on said notes.

XV. That in pursuance of said order, dated the first Tuesday of July, 1856, he did, on the 31st day of July, 1856, assess all the premium notes of said company to the entire amount due on each and every of said notes, and did make his certificate of the said assessment; which said certificate of assessment he caused to be filed in the office of the clerk of said county of Montgomery on the 13th day of August, 1856, and the defendant was required to pay said assessment, of which said assessment the said defendant had due notice on said 13th day of August, 1856.

XVI. That the defendant has neglected to pay the said assessment.

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 SECTION X.

## COMPLAINTS ON BILLS OF EXCHANGE.

[See Prefatory Note to preceding Section, *ante*, p. 217.]

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## I. PAYEE AGAINST ACCEPTOR.

320. *Short Form, Setting out a Copy of the Bill. (a)*

I. That on the       day of       , 18       , at       , the defendant [or, the defendants, under their firm-name of Y. Z. & Co.] accepted and delivered to the plaintiff a bill of exchange, of which the following is a copy: [*copy of the bill and acceptance*].

II. That there is now due to the plaintiff thereon from the defendant the sum of       dollars with [       dollars damages (b) and] interest from, &c.

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(a) This form is supported by *Andrews v. Astor Bank*, 2 *Duer*, 629; *Levy v. Ley*, 6 *Abbotts' Pr.*, 89. A bill of exchange is, in an action against the acceptor, "an instrument for the payment of money only." Thus where the defendant was a corporation and the bill was addressed to its president and accepted by him as such,—*Held*, that an averment that he was president and authorized to accept, was not necessary in addition to the averments

required by section 162. *Andrews v. Astor Bank*, 2 *Duer*, 629; *Price v. McClave*, 6 *Id.*, 544; affirming *S. C.*, 5 *Id.*, 670; 3 *Abbotts' Pr.*, 253.

(b) If it be a foreign bill drawn or negotiated within this State, demand judgment for damages according to the rates prescribed by statute. 1 *Rev. Stat.*, 770.

In an action upon a bill of exchange, a claim for statutory damages, and costs of protest, need not be set forth in the

## Complaint by Payee, against Acceptor.

321. *The Same, Pleading the Legal Effect.*

I. That on the            day of           , 18   , at           , one M. N. [or, certain persons, under their firm-name of M. N. & Co.] made his [or, their] bill of exchange in writing, dated on that day, directed to the defendant [or, to the defendants under their firm-name of Y. Z. & Co.], at           ; and thereby required the defendants to pay to the order of the plaintiff (c) [or, of these plaintiffs, under their firm-name of A. B. & Co.],           dollars,           days after said date [or otherwise], for value received.

II. That thereupon [or, on the            day of           , 18   , at           ], the defendant [or, the defendants, under said firm-name] upon sight thereof accepted said bill. (d)

III. That no part of the same has been paid (e) [except the sum of, &c.] (f)

petition as a separate and distinct cause of action, disconnected from the claim on the bill. *Summit Co. Bank v. Smith*, 1 *Handy*, 575.

(c) In an action on a draft, brought by the Camden Bank against the drawer, after showing that the draft was made payable "to the order of W. B. Storm, cashier," an averment that the defendant "delivered the said draft to W. B. Storm, cashier of said Camden Bank, for the said bank," and that "the said draft is now held and owned by the said plaintiffs, and still remains due to them from the defendants," sufficiently shows that the bank and not the cashier is the real party in interest. *Camden Bank v. Rodgers*, 4 *How. Pr.*, 63; S. C., 2 *Code R.*, 45.

(d) It is held not necessary to aver that the acceptance was in writing. A general averment that the bill was accepted implies that the acceptance was in writing, as the bill could not under the statute be accepted without. *Bank of Lowville v. Edwards*, 11 *How. Pr.*, 216; and see *Chalie v. Belshaw*, 6 *Bing.*, 529; S. C., 19 *Eng. Com. L. R.*, 240; and see forms prescribed in the English rules of court, 1 *Chit. Pl.*, 723.

And a case of a bill destroyed or withheld by the drawee is no exception, for there the drawee is deemed to have accepted.

So, of a written agreement to accept, it was held that since it amounts to an acceptance, it should be counted upon as an acceptance, and no consideration need be shown. *Ontario Bank v. Worthington*, 12 *Wend.*, 593.

An allegation, in a complaint, that certain drafts were accepted by a corporation, by their treasurer, includes an averment of authority to the treasurer to accept the drafts; inasmuch as the company could not accept by him, unless he had such authority. What is necessarily understood, or implied, in a pleading, forms part of it, as much as if it was expressed. *Partridge v. Badger*, 25 *Barb.*, 146.

(e) Against the acceptor it is not necessary to aver or prove presentment at the place where the bill was made payable. It is for him to show that he was ready there on the day of maturity, and always ready afterwards, but the bill was not presented; and proof of this relieves him from interest and costs. *Foden v. Sharp*, 4 *Johns.*, 183



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 Payee of Bill, against Acceptor.
 

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322. *On an Acceptance, Varying as to Time from the Bill.*

I. [As in the preceding form.]

II. That thereupon [or, on the                      day of                      , 18    , at                      ] the defendant [or, the defendants, under said firm-name], upon sight thereof, accepted the same, payable at                      days [or otherwise] after the date of said bill [or, after said *date of acceptance*].

III. [As in the preceding form.]

323. *Against Acceptor for Honor.*

I. That on the                      day of                      , 18    , at                      , one M. N. [or, certain persons, under their firm-name of M. N. & Co.] made, and delivered to the plaintiff, his [or, their] bill of exchange in writing, dated on that day, and directed the same to one O. P. [or, to certain persons, under their firm-name of, &c.], and thereby required said O. P. to pay to the order of this plaintiff [or, of these plaintiffs, under their firm-name of A. B. & Co.] the sum of                      dollars,                      days after date thereof [or otherwise], for value received.

II. That then and there [or, on the                      day of                      , 18    , at                      ] it was duly presented to said O. P. for acceptance, but was not accepted [if a foreign bill, add, and was thereupon duly protested for non-acceptance], of all which due notice was given to said [drawers].

III. That then and there [or, on the                      day of                      , 18    , at                      ,] the defendant [or, the defendants, under their firm-name of Y. Z. & Co.], upon sight thereof, accepted said bill for the honor of said [drawer].

IV. That at maturity the same was duly presented for payment to said O. P. [the drawee], but was not paid [if a foreign bill, add, and was thereupon duly protested for non-payment], of all which due notice was given to the defendant [acceptor for honor] and to said M. N. [drawer]. (g)

Wolcott v. Van Santvoord, 17 *Id.*, 248; Caldwell v. Cassidy, 8 *Cow.*, 271; Haxton v. Bishop, 3 *Wend.*, 13; Green v. Goings, 7 *Barb.*, 652.

(f) As to demanding damages, see note (b), *supra*.

(g) To recover against the acceptor for honor, it must be shown that the bill was presented at maturity to the drawee, and that the drawer had notice of non-payment. Williams v. Germaine, 7 *Barnw. & C.*, 468; Schofield

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 Complaint by Payee or Assignee, against Acceptor.
 

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V. That no part of the same has been paid [except the sum of, &c.]

324. *On a Bill directed by the Drawer to Himself and Accepted by Him. (h)*

I. That on the       day of       , 18       , at       , the defendant [or, the defendants, under their firm-name of Y. Z. & Co.] made and accepted, and delivered to the plaintiff, his [or, their] bill of exchange in writing, of which the following is a copy: [*copy of the bill and acceptance*]. (i)

II. That there is now due to the plaintiff thereon, from the defendant, the sum of       dollars, with [       dollars damages and] interest from, &c.

325. *By Assignee of a Bill Payable out of a Particular Fund. (j)*

I. That on the       day of       , 18       , at       , one M. N. made his [or, certain persons, under their firm-name, &c., made their] bill of exchange or order in writing, dated on that day, and directed it to the defendant [or, to the defendants, under their firm-name of, &c.], and thereby required the defendant

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v. Bayard, 3 *Wend.*, 488. As to whether it is in all cases necessary to aver a protest for non-acceptance and notice to the drawer, as in paragraph II., see 2 *Chit. Pl.*, 177, note o. For a complaint joining the drawer also, see Form 334, *infra*.

The accommodation acceptor who pays without funds, can recover from the drawer, not upon the bill, but for money paid. *Griffith v. Reed*, 21 *Wend.*, 502; *Suydam v. Westfall*, 4 *Hill*, 211. See COMPLAINTS FOR MONEY LENT, PAID, &c. *ante*, 160.

(h) In an action by the payee of a draft drawn by the president of a corporation on the treasurer of the corporation, for payment of an indebtedness of the corporation to the payee, the complaint may be framed as on a prom-

issory note of the corporation. 3 *Mann & G.*, 576. It is not necessary, if the complaint states the indebtedness for which the note was given, to allege presentment to the drawee for payment. The burden of proof is on the corporation to show that the drawee was provided with funds and ready to pay at maturity, in order to exempt them from damages and costs. (17 *Johns.*, 248.) *Fairchild v. Ogdensburgh, Clayton & Rome R. R. Co.*, 15 *N. Y.*, 337.

(i) See note (a), *supra*.

(j) A written acceptance of an order for the delivery of goods is not a sale; it is only a promise to deliver them upon request, and should be declared on as such. *Burrall v. Jacot*, 1 *Barb.*, 165.

## By Payee of Bill of Exchange.

to pay to one O. P., out of the proceeds of [*state fund as in the bill*],        dollars,        days after the date [*or, sight*] thereof [*or otherwise*], for value received, and delivered it to said [*payee*].

II. That on the        day of        , at        [*or, then and there*], upon sight thereof, the defendant accepted the same, payable, when in funds, from the proceeds of [*&c., as in acceptance*]. (*k*)

III. That on the        day of        , 18        , at        , said [*payee*] duly assigned said bill to this plaintiff.

IV. That on the        day of        , 18        , the defendant had funds of the said [*drawer*], proceeds of, &c.

V. That payment of said bill was, on the        day of        , 18        , at        , duly demanded by this plaintiff from the defendant.

VI. That no part thereof has been paid [except the sum of, &c.]

## II. PAYEE AGAINST DRAWER.

326. *On a Bill Payable at a Certain Time after Date or Sight,—for Non-acceptance.* (*l*)

I. That on the        day of        , 18        , at        , the defendants [*drawers*], [under their firm-name of Y. Z. & Co.], made and delivered to the plaintiff their bill of exchange in writing, dated on that day, and directed the same to one M. N. [*or, to certain persons, under the firm-name of M. N. & Co.*], and thereby required said [*drawee*] to pay to the order of this plaintiff [*or, of these plaintiffs, under their firm-name of A. B. & Co.*]        dollars,        days [*or, weeks, or, months*] after the date [*or, sight*] thereof, for value received.

(*k*) An acceptance generally, without words of restriction to a fund or contingency, will in some cases bind the acceptor absolutely (see *Atkinson v. Manks*, 1 *Cow.*, 691; *Maber v. Massias*, 2 *W. Blackst.*, 1072; *Lent v. Hodgman*, 15 *Barb.*, 274); and in such cases it is unnecessary to aver that he had funds.

(*l*) The holder of a bill, upon protest for non-acceptance, has an immediate cause of action against the drawer; and even at common law, if demand of payment and protest were deemed void, averments of them might be rejected if the declaration counted properly for non-acceptance. *Mason v. Franklin*, 3 *Johns.*, 202.

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 Complaint by Payee, against Drawer.
 

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II. That the same was duly presented to [*the drawee*] for acceptance, but was not accepted (*m*) [*if a foreign bill, add,* and was thereupon duly protested for non-acceptance], of all which due notice was given to the defendant [*drawer*].

III. That no part of the same has been paid [except the sum of, &c.]

327. *On the Same; Another Form, setting out a Copy of the Bill.* (*n*)

I. That on the                      day of                      , 18                      , at                      , the defendants [*drawers*], [under their firm-name of Y. Z. & Co.], made and delivered to the plaintiff their bill of exchange in writing, of which the following is a copy: [*copy of the bill*]. (*o*)

✓ II. That the same was duly presented to [*the drawee*] therein named for acceptance, but was not accepted [*if a foreign bill, add,* and was thereupon duly protested for non-acceptance], of all which due notice was given to the defendant [*drawer*].

III. That there is now due to the plaintiff thereon the sum of                      dollars [with                      dollars damages] and interest from, &c.

328. *On a Bill Payable on a Day Certain, or at Sight, or at a Certain Time after Date,—for Non-payment.*

I. That on the                      day of                      , 18                      , at                      , the defendants [*drawers*], [under their firm-name of, &c.], made and

(*m*) In a complaint against the drawer of a bank check or of a bill of exchange, properly so called, it is necessary to aver either demand, and notice to the drawer of non-payment, or such facts,—*e. g.*, want of funds at bank,—as excuse demand and notice. *Shultz v. Depuy*, 3 *Abbotts' Pr.*, 252. If the drawee destroys or refuses to return the bill he may be deemed to have accepted it. In that case the complaint may be for non-payment. See Form 329, *infra*.

In an action against the acceptor, an averment in the complaint that payment of the bill "was duly demanded at maturity, and the same was there-

upon duly protested for non-payment," was held sufficient to admit evidence of demand, neglect, or refusal to pay, and notice thereof to the drawer. *Woodbury v. Sackrider*, 2 *Abbotts' Pr.*, 402.

(*n*) The action on a bill of exchange against the drawer may, according to the better opinion, like an action against an indorser, be considered as an action on an instrument for the payment of money only, within the meaning of section 162 of the Code.

(*o*) The holder must sue on that one of the set that was dishonored. *Downes v. Church*, 13 *Pet.*, 205; *Wells v. Whitehead*, 15 *Wend.*, 527.

## By Payee against Drawer.

delivered to the plaintiff their bill of exchange in writing, dated on that day, and directed the same to one M. N. [*or, to certain persons, under their firm-name of, &c.*], and thereby required said [*drawee*] to pay to the order of this plaintiff [*or, of these plaintiffs, under their firm-name of, &c.*]          dollars on the day of          , 18          , [*or, at sight, or,          days after the date thereof, or otherwise*], for value received.

II. That the same was duly presented to [*the drawee*] for payment, (*p*) but was not paid [*if a foreign bill, add, and was thereupon duly protested for non-payment*], of all which due notice was given to the defendant [*drawer*].

III. That no part of the same has been paid [except the sum of, &c.]

329. *On a Bill Payable after Date or Sight,—for Non-payment after Acceptance.*

I. That on the          day of          , 18          , at          , the defendants [under their firm-name of Y. Z. & Co.] made and delivered to the plaintiff their bill of exchange in writing, dated on that day, and directed the same to one M. N. [*or, to certain persons, under their firm-name of M. N. & Co.*], and thereby required said [*drawee*] to pay to the order of this plaintiff [*or, of these plaintiffs, under their firm-name of A. B. & Co.*]          dollars,          days after the date thereof [*or otherwise*], for value received.

II. That then and there [*or, on the          day of          , 18          , at* ], the said [*drawee*] upon sight thereof, accepted said bill.

III. That at maturity the same was duly presented to said [*drawee*] for payment, but was not paid [*if a foreign bill, add, and was thereupon duly protested for non-payment*], of all which due notice was given to the defendant [*drawer*].

IV. That no part of the same has been paid [except the sum of, &c.]

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(*p*) In action against the drawer of a bill payable on a day certain, or a certain time after date, it is not necessary to aver presentment for acceptance to the drawee. *Allen v. Suydam*, 20 *Wend.*, 321; *Montgomery County Bank v. Albany City Bank*, 8 *Barb.*, 396; *Philpott v. Bryant*, 3 *Carr. & P.*, 244; *S. C.*, 14 *Eng. Com. L. R.*, 549.

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Complaint by Payee of Bill, Excusing Want of Demand, &c.

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330. *On the Same, Non-presentment for Acceptance Excused, (g)  
the Drawer having Countermanded the Bill.*

I. [State the making and delivery of the bill, as in paragraph I. of Form 326, or, if payable at sight, as in Form 328.]

II. That on or about the       day of       , 18    , said bill not then having been presented for acceptance [or, for payment], the defendant countermanded the same by instructions to the said [drawee] not to accept or pay [or, if payable at sight, not to pay] the same; wherefore it was not presented.

III. That no part of the same has been paid [except the sum of, &c.]

331. *On the Same, Non-presentment for Acceptance Excused  
because the Drawee could not be found.*

I. [State the making and delivery of the bill, as in paragraph I. of Form 326, or, if payable at sight, as in Form 328.]

II. That on the       day of       , 18    , due search and inquiry was made for said drawee at [the place of address], in order that the same might be presented to him for acceptance, but he could not be found, and the same was not accepted [and if a foreign bill, add, and was thereupon duly protested for non-acceptance], of all which due notice was given to the defendant [drawer].

III. That no part of the same has been paid [except the sum of, &c.]

332. *On the Same, Demand and Notice Excused by Waiver.*

I. [As in preceding forms.]

II. That the defendant at the time said bill was transferred by him, waived as well the presentation of the same to said W. X. for payment, as notice of the non-payment thereof, and no part thereof has been paid.

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(g) For averment of waiver of omission to give notice, see Form 310, ante, 234.

## On Bills of Exchange.

## III. PAYEE AGAINST DRAWER AND ACCEPTOR.

333. *On a Bill Accepted by the Drawee.*

I. That on the            day of           , 18   , at           , the defendants [*drawers*], [under their firm-name of Y. Z. & Co.], made and delivered to the plaintiff their bill of exchange in writing, dated on that day, and directed the same to the defendant [*acceptor*; *or*, to the defendants, *acceptors*, under their firm-name W. X. & Co.], and thereby required said [*acceptor*] to pay to the order of the plaintiff [*or*, of the plaintiffs, under their firm-name of A. B. & Co.]            dollars,            days after the date thereof [*or otherwise*], for value received.

II. That then and there [*or*, on the            day of           , 18   , at           ], the defendant [*acceptor*], upon sight thereof, accepted said bill.

III. That at maturity the same was duly presented to the defendant [*acceptor*] for payment, but was not paid [*if a foreign bill, add*, and was thereupon duly protested for non-payment], of all which due notice was given to the defendant [*drawer*].

IV. That no part of the same has been paid.

334. *On a Bill Accepted for Honor.*

I. That on the            day of           , 18   , at           , the defendants [*drawers*], [under their firm-name of Y. Z. & Co.], made and delivered to the plaintiff their bill of exchange in writing, dated on that day, and directed the same to one M. N. [*or*, to certain persons, under their firm-name of M. N. & Co.], and thereby required said [*drawee*] to pay to the order of this plaintiff [*or*, of these plaintiffs, under their firm-name of A. B. & Co.]            dollars,            days after the date thereof [*or otherwise*], for value received.

II. That then and there [*or*, on the            day of            18   , at           ], it was duly presented to said [*drawee*] for acceptance, but was not accepted [*if a foreign bill, add*, and was thereupon duly protested for non-acceptance], of all which due notice was given to the defendant [*drawer*]. (r)

(r) As to whether it is in all cases of to the drawer, as preliminary to an necessary to aver protest for non-acceptance for honor, see 2 *Chit. Pl.*,  
 ance by the drawee, and notice there 177, note a.

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 Complaints by Indorsee of Bill of Exchange.
 

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III. That then and there [*or, on the*            day of            , 18    , at            ,] the defendant [*acceptor for honor*], upon sight thereof, accepted said bill for the honor of said [*drawer*].

IV. That at maturity the same was duly presented for payment to said [*drawee*], but was not paid [*if a foreign bill, add, and was thereupon duly protested for non-payment*], of all which due notice was given to the defendants [*drawers*].

V. That thereupon the same was duly presented to the defendant [*acceptor for honor*] for payment, but was not paid [and was thereupon duly protested for non-payment], of all which due notice was given to the defendant [*drawer*].

VI. That no part of the same has been paid.

#### IV. BY INDORSÉE.

##### 335. *Remote Indorsee against Acceptor. (s)*

I. That on the            day of            , 18    , at            , the defendant [*or, the defendants under their firm-name of Y. Z. & Co.*], accepted and delivered to the payee therein named a bill of exchange of which the following is a copy: [*copy of the bill and acceptance*].

II. That said [*payees*], [under their firm-name of M. N. & Co.], thereafter indorsed said bill and delivered it so indorsed, and thereafter [and before maturity] the same came lawfully into the possession of these plaintiffs for value.

III. That there is now due to this plaintiff thereon from the defendant the sum of            dollars with [damages and] interest from, &c.

##### 336. *Against Drawer and Indorser,—for Non-acceptance.*

I. That on the            day of            , 18    , at            , the defendants [*drawers*], [under their firm-name of Y. Z. & Co.], made their bill of exchange in writing, dated on that day, and directed it to one M. N. [*or, to certain persons, under the firm-name of M. N. & Co.*], and thereby required said [*drawee*] to pay to the order of the defendant [*indorser, or, of one O. P.*]

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(s) This form is supported by *Levy nom. Levy v. Ely*, 15 *How. Pr.*, 395; *v. Ley*, 6 *Abbotts' Pr.*, 89; *S. C.*, *sub Phelps v. Ferguson*, 9 *Abbotts' Pr.*, 206.



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By Indorsee of Bill of Exchange.

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dollars,            days after the date thereof [*or otherwise*],  
for value received.

II. That the said [*drawers*] then and there delivered the same to the defendant [*indorser*, *or*, to said O. P., who then and there indorsed it to the defendant, *indorser*].

III. That then and there [*or*, on the            day of            , 18    , at            ], the defendant [*indorser*] indorsed the same to the plaintiff [*or*, indorsed the same and delivered it so indorsed, and thereafter [and before maturity] the same came lawfully into the possession of the plaintiff for value]. (*t*)

IV. That the same was duly presented to [*the drawee*] for acceptance, but was not accepted [*if a foreign bill, add*, and was thereupon duly protested for non-acceptance], of all which due notice was given to the defendants.

V. That no part of the same has been paid [except the sum of, &c.]

337. *Against Drawer, Indorser before Acceptance, and Acceptor, —for Non-payment.*

I. That on the            day of            , 18    , at            , the defendant [*drawer*] made his [*or*, the defendants, *drawers*, under their firm-name of, &c., made their] bill of exchange in writing, dated on that day, and directed it to the defendants [*acceptors*, under their firm-name of, &c.], and thereby required the defendants [*acceptors*], to pay to the order of the defendant [*indorser*, *or*, of one M. N.]            dollars,            days [*or*, weeks, *or*, months], after the date [*or*, sight] thereof, for value received.

II. That the said [*drawer*] then and there delivered the same to the defendant [*indorser*, *or*, to the said M. N., who thereupon indorsed it to the defendant, *indorser*].

III. That then and there [*or*, on the            day of            , 18    , at            ], the defendant [*indorser*] indorsed the same to this plaintiff [*or*, indorsed the same and delivered it so indorsed, and thereafter [and before maturity] the same came lawfully into the possession of this plaintiff for value].

IV. That then and there [*or*, on the            day of            , 18    ,

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(*t*) This form of averring plaintiff's son, 9 *Abbotts' Pr.*, 206; and see *Green-*  
title is supported by *Phelps v. Fergu-* *bury v. Wilkins, Id.*, 206, *note*.

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 Complaints by Indorsee of Bill. By Drawer.
 

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at           ], the defendants [*acceptors*], [under their firm-name of, &c.], upon sight thereof, accepted said bill.

V. That at maturity the same was duly presented to the defendant [*acceptor*] for payment, but was not paid [*if a foreign bill, add, and was thereupon duly protested for non-payment*], of all which due notice was given to the defendants [*drawer and indorser*].

VI. That no part of the same has been paid.

338. *Against Drawer, Acceptor, and Indorser after Acceptance,—for Non-payment.*

I. That on the           day of           , 18   , at           , the defendants [*drawers*], [under their firm-name of, &c.], made their bill of exchange in writing, dated on that day, and directed it to the defendants [*acceptors*], [under their firm-name of, &c.], and thereby required said defendants [*acceptors*], to pay to the order of the defendant [*indorser, or, of one M. N., or, of certain persons under their firm-name of, &c.*]           dollars, days after the date thereof [*or otherwise*] for value.

II. That then and there the defendants [*drawers*], delivered the same to the defendant [*indorser, or, to said M. N., who thereupon indorsed it to the defendant, indorser*].

III. That then and there [*or, on the           day of           , 18   , at*], the defendants [*acceptors*], [under their firm-name of, &c.] upon sight thereof, accepted said bill.

IV. That then and there [*or, on the           day of           , 18   , at*], the defendant [*indorser*] indorsed the same to this plaintiff [*or, indorsed the same, and delivered it so indorsed, and thereafter [and before maturity] the same came lawfully into the possession of this plaintiff for value*].

V. & VI. [*As in the preceding form.*]

V. DRAWER AGAINST ACCEPTOR. (*u*)

339. *On a Bill Returned to, and Taken Up by the Drawer.* (*v*)

I. That on the           day of           , 18   , at           , the plaintiffs [under their firm name of, &c.], made and delivered to the

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(*u*) This action may be maintained through the payee. *Kingman v. Ho-*  
 without deducing title to the bill taling, 25 *Wend.*, 423, and cases there

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By Drawer of Bill, against Acceptor.

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payee therein named, their bill of exchange in writing, dated on that day, and directed it to the defendants [under their firm-name of, &c.], and thereby required the defendant to pay to the order of one M. N. [or, of certain persons under their firm-name of, &c.],        dollars,        days after the date thereof [or otherwise].

II. That then and there [or, on the        day of        , 18    , at        ], the defendants [under their said firm-name], upon sight thereof, accepted said bill for value received.

III. That at maturity the same was duly presented for payment but was not paid.

IV. That on the        day of        , 18    , at        , the same was returned to the plaintiff for non-payment, (w) and the plaintiff, as drawer thereof, was then and there compelled to take up the same and to pay to said [payee, or, to the holder thereof], the sum of        dollars, being the amount of said bill with damages [or, with costs of protest] and interest.

V. That no part of the same has been repaid [except the sum of, &c.]

340. *On a Bill Payable to the Drawer's own Order, and not Negotiated.*

I. That on the        day of        , 18    , at        , the plaintiffs [under their firm-name of A. B. & Co.] made their bill of exchange in writing, dated on that day, and directed it to the defendants [under their firm-name of, &c.], and thereby required the defendant to pay to the order of the plaintiffs        dollars,        days after date thereof [or otherwise].

II. That the defendant thereupon [or, on the        day of

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cited. If the drawer has only paid a part, so that he has not taken up the bill, he should sue, not on the bill, but for money paid, &c. See Form 220, *ante*, 168.

(v) A complaint against the drawers of a bill, alleging that they had refused to accept, and that they had had a settlement of accounts with the drawers, and that on such settlement the

drawers had left in their hands sufficient money to pay the bill, which they had then agreed to pay, is sufficient. *Mittenbeyer v. Atwood*, 18 *How. Pr.*, 330.

(w) When the drawer sues on a bill payable to a third person, it is necessary to state that it was dishonored, and taken up and paid by the plaintiff. 2 *Chit. Pl.*, 148.

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 Complaints in Actions on Checks.
 

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, 18 , at ], upon sight thereof accepted said bill, for value received, and delivered it to the plaintiff.

III. That no part of the same has been paid [except the sum of, &c.]

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 SECTION XI.

## COMPLAINTS UPON CHECKS.

## I. AGAINST DRAWER.

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## II. AGAINST DRAWER, INDORSER, AND DRAWEE.

345. Indorsee, or bearer, against drawer and indorser.....	260
346. Against the bank, drawee, having certified .....	261

## I. AGAINST DRAWER.

341. *Payee against Drawer.*

I. That on the day of , 18 , at , the defendant [*or*, the defendants, under their firm-name of Y. Z. & Co.] made and delivered to the plaintiff his [their] check in writing, dated on that day, and directed the same to the Bank of M. N. [*or*, to certain persons, under the firm-name of, &c.], and thereby required said [*drawee*] to pay to the plaintiff or order [*or*, bearer], (a) dollars, (b) for value received.

II. That the same was duly presented (c) to the said [*drawee*] for payment, but was not paid; of all which due notice was given to the defendant [*drawer*]. (d)

III. That no part of the same has been paid.

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(a) A check payable to the order of Bank, 2 *Duer*, 121),—is to be deemed a fictitious person,—*e. g.*, to the order payable to bearer if negotiated by the of a firm long since dissolved (Stevens maker. See note (e), *infra*.  
*v. Strang*, 2 *Sandf.*, 138), or “to the order (b) When no time of payment is of bills payable” (*Willets v. Phoenix mentioned, the check or note is pay-*

## On Checks upon Bankers.

342. *Indorsee, or Bearer, against Drawer.*

I. That on the            day of           , 18   , at           , the defendant made his check [*or, the defendants, under their firm-name of, &c., made their check*] in writing, dated on that day, and directed the same to the Bank of M. N. [*or, to certain persons, under their firm-name of, &c.*], and thereby required said [*drawees*] to pay to one O. P. or order [*or, bearer*],            dollars for value received.

II. That the defendant then and there delivered the same to said [*payee*], [*if payable to order, add, who indorsed the same and delivered it so indorsed*], (*e*) and the same thereafter came lawfully to the possession of this plaintiff.

III. That thereafter the same was duly presented to said [*drawee*] for payment, but was not paid, of all which due notice was given to the defendant.

IV. That no part of the same has been paid.

able immediately, and it is unnecessary that the complaint should state a time of payment. *Herrick v. Bennett*, 8 *Johns.*, 374; *Pearsoll v. Frazer*, 14 *Barb.*, 564; and see *Thompson v. Ketcham*, 8 *Johns.*, 189.

By the statute of 1857, 838, ch. 416, § 2, it is provided that all checks, bills of exchange, or drafts, appearing on their face to have been drawn upon any banking association or individual banker, carrying on banking business under the act to authorize the business of banking, which are on their face payable on any specified day, or in any number of days after the date or sight thereof, shall be deemed due and payable on the day mentioned for the payment of the same, without any days of grace being allowed, and it shall not be necessary to protest the same for non-acceptance.

(*c*) As against the drawer, presentment at any time before suit brought is sufficient, unless it appear that he has been prejudiced by unreasonable delay on the part of the holder. Little

*v. Phoenix Bank*, 2 *Hill*, 425, and cases there cited; *S. C.*, 7 *Id.*, 359; *Harbeck v. Craft*, 4 *Duer*, 122.

(*d*) In general, presentment and notice of non-payment are necessary to charge the drawer of a check. *Harker v. Anderson*, 21 *Wend.*, 372; *Shultz v. Depuy*, 3 *Abbotts' Pr.*, 252; and see *Franklin v. Vanderpool*, 1 *Hall*, 78; but compare *Cruger v. Armstrong*, 3 *Johns. Cas.*, 5; *Conroy v. Warren*, *Id.*, 259; *Elting v. Brinckerhoff*, 2 *Hall*, 459. It is otherwise if the drawees have failed, or their business has been stopped by an injunction, or if the drawer had no funds in their hands; but in such a case the fact must be averred in excuse of the omission to demand or give notice of non-payment. See Forms 343 and 344, *infra*.

(*e*) If payable to bearer or to a fictitious person, instead of stating that it was payable to O. P., &c., say, "and thereby required said [*drawee*] to pay to the bearer thereof            dollars, for value received; and thereupon the defendant negotiated the same."

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Allegations of Excuse for not Presenting Check.

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343. *Omission to Give Notice of Non-payment Excused because the Drawer had no Funds.*

I. [As in paragraph I. of preceding forms.]

II. That thereafter the same was duly presented (f) to said [drawee] for payment, but the defendant had no funds (g) with said [drawee], and no part of the same has been paid.

344. *Non-presentment Excused because of Insolvency of the Drawee.*

I. [As in preceding forms.]

II. That on the            day of           , 18   , (h) said [drawee] was insolvent [or, had stopped payment], (i) and no part of the same has been paid.

II. AGAINST DRAWER, INDORSER, AND DRAWEE.

345. *Indorsee, or Bearer, against Drawer and Indorser.*

I. That on the            day of           , 18   , at           , the defendant [drawer], [or, the defendants, under their firm-name of, &c.], made his [their] check in writing, dated on that day, and directed the same to the bank of M. N. [or, to certain persons under, &c.], and thereby required said [drawee] to pay to the defendant [indorser], or order [or bearer],            dollars, for value received, and delivered it to the defendant [indorser]. (j)

(f) Want of funds in the drawee's hands excuses the omission to give notice of non-payment. As to whether it excuses non-presentment, see *Cruger v. Armstrong*, 3 *Johns. Cas.*, 5; *Fitch v. Redding*, 4 *Sandf.*, 130; *Conroy v. Warren*, 3 *Johns. Cas.*, 259; *Franklin v. Vanderpool*, 1 *Hall*, 78; *Shultz v. Depuy*, 3 *Abbotts' Pr.*, 252.

(g) In all cases where it is intended to rely upon want of funds as excusing demand or notice, that fact must be averred. *Shultz v. Depuy*, 3 *Abbotts' Pr.*, 252; *Garvey v. Fowler*, 4 *Sandf.*, 665; *Fitch v. Redding*, *Id.*, 130; *Franklin v. Vanderpool*, 1 *Hall*, 78. And

generally, evidence in excuse for non performance is not admissible under an averment of performance.

(h) The time should be stated, that it may appear whether it was such as to excuse the holder from a demand. See 1 *Chit. Pl.*, 289.

(i) As against drawer, these facts dispense with presentment and notice. *Lovett v. Cornwell*, 6 *Wend.*, 369.

(j) If the indorser was not the payee, substitute "to pay to one O. P. [or, to certain persons, &c.] or order [or, bearer]            dollars, for value received, and delivered it to said O. P. [who thereupon indorsed the same, and delivered

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Upon Checks on Bankers.

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II. That thereupon said defendant [*indorser, or, the defendants, indorsers*, under their firm-name of, &c.] indorsed the same to this plaintiff [*or, indorsed the same, and delivered it so indorsed; and thereafter it came lawfully into the possession of this plaintiff*], for value.

III. That said check was duly presented for payment, but was not paid, of all which due notice was given to the defendants.

IV. That no part of the same has been paid.

*346. Against the Bank, Drawee, having Certified.*

I. That the defendants are a corporation, created by and under the laws of this State, organized pursuant to an act of the Legislature entitled "An Act to authorize the business of Banking" [*or, if the bank was organized under a special charter, state title of its charter*], passed April 18, 1838 [*or, date of special charter*], and the acts amending the same.

II. That on the            day of           , 18   , at           , one M. N. made his check [*or, certain persons, under their firm-name of M. N. & Co., made their check*] in writing, bearing date on that day, and directed it to the defendants, and thereby required them to pay to this plaintiff or order [*or, bearer*], dollars, for value received; and delivered the same to this plaintiff [*or, if payable to a third party, state it as in preceding form*].

III. That then and there [*or, on the            day of           , 18   , at*] the defendants, by their agent duly authorized thereto (*k*) in writing, accepted and certified the same to be good.

IV. That thereafter the same was duly presented for payment, but no part thereof has been paid.

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it so indorsed]." These last words are necessary if the check was payable to order. When payable to order of a fictitious person, state negotiation by maker, as in note (*e*), *supra*.

(*k*) As to the authority of the cashier,

or paying-teller, or president, to certify, see *Willeys v. Phoenix Bank*, 2 *Duer*, 121; *Farmers' Bank v. Butchers & Drovers' Bank*, 4 *Id.*, 219; *Clafin v. Farmers & Citizens' Bank*, 25 *N. Y.*, 293; *S. C.*, 24 *How. Pr.*, 1.

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 Complaints in Actions on Accounts.
 

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## SECTION XII.

## COMPLAINTS ON NON-NEGOTIABLE INSTRUMENTS FOR THE PAYMENT OF MONEY.

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## ARTICLE I.—ACCOUNTS.

347. Common form for money due on an account .....	p. 262
348. On an account stated .....	262

347. *Common Form for Money Due on an Account. (a)*

I. That the defendant is indebted to the plaintiffs in the sum of        dollars, upon an account for [*here state briefly the consideration,—e. g., goods sold and money lent*], at        , between the day of        , 18    , and the        day of        , 18    .

II. That the sum of        dollars became payable thereon on the        day of        , but no part thereof has been paid.

348. *On an Account Stated. (b)*

I. That on the        day of        , 18    , at        , an account was stated (c) between the plaintiff and the defendant; (d

(a) This form is supported by *Allen v. Patterson*, 7 *N. Y.* (3 *Seld.*), 476. See *ante*, 163, note (f).

(b) This form is supported by *Graham v. Camman*, 13 *How. Pr.*, 360.

An action for balance due on a settlement of accounts, is held not on an account, within the rule of the Iowa Code, that an account sued on must be annexed to the pleading. *Buehler v. Reed*, 11 *Iowa*, 182.

(c) An averment that one party made a statement of an account, and delivered it to the other, who made no objection to it, is not an averment that an account was stated between them. At most, these are matters of evidence, tending to show, but not conclusively, an account stated. *Emery v. Pease*, 20 *N. Y.*, 62.

(d) Where, after the death of one partner, an account is stated between



## In Actions on Awards.

and upon such statement a balance of                      dollars was found to be due from said defendant to this plaintiff.

II. That [the defendant then and there promised to pay said sum, but] (e) no part thereof has been paid.

## ARTICLE II.—AWARDS.

349. On an award of arbitrators .....	p. 263
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349. *On an Award of Arbitrators.*

I. That on the                      day of                      , 18                      , at                      , disputes and differences were subsisting between the plaintiff and the defendant, touching a demand by the plaintiff against said defendant, for the sum of                      dollars for [services rendered by this plaintiff to the said defendant, at his request, in drawing plans and specifications of a dwelling-house for the defendant, which demand the defendant disputed and refused to pay; *or, state other claims, according to the circumstances of the case*].

II. That for the purpose of putting an end to said disputes and differences, they then and there [by an agreement in writing] (f) submitted themselves to the award, arbitrament, and final determination of one M. N., an arbitrator [*or, M. N. and O. P., two arbitrators*], indifferently chosen on behalf of the plaintiff and the defendant, to arbitrate and determine concerning said disputes and differences; and mutually promised each other to abide by and perform his award [*or, they then*

defendant and the copartnership, admitting a balance due by him for goods sold in the lifetime of the deceased, the surviving partner may recover without averring the death of the other partner, and the survivorship; for stating the account is in the nature of a new promise to the survivor. *Holmes v. De Camp*, 1 *Johns.*, 34.

(e) The words in brackets are unnecessary if there was no express promise.

(f) It is only necessary that the submission to arbitration should be in writing where it is made under the

provisions of the Revised Statutes (2 *Rev. Stat.*, 542), and is intended to be enforced by the entry of judgment directly upon the award, as there provided. An oral submission is good at common law, and an action may be maintained upon the award. *Cope v. Gilbert*, 4 *Den.*, 347; *Diedrick v. Richley*, 2 *Hill*, 271; *Hays v. Hays*, 23 *Wend.*, 363; *Wells v. Lain*, 15 *Id.*, 99. So an umpire may be appointed by parol, unless the submission require the appointment to be in writing. *Elmendorf v. Harris*, 5 *Id.*, 516; but compare *S. C.*, 23 *Id.*, 628.

## Complaints on Awards.

and there, by an agreement in writing, a copy of which is hereto annexed, and marked "Exhibit A," agreed to submit the same to the award of M. N.]

III. That thereafter the said arbitrator, (g) having undertaken the arbitration, heard the plaintiff and the defendant, and on the       day of       , 18       , at       , duly made and published [and where such notice is required by the submission, add, and notified the said parties of] his award (h) [in writing] (i) of and concerning the matter so referred [which award bears date the       day of       , 18       ]; and thereby he awarded and declared, that after due appearance before him on behalf of this plaintiff and said defendant, he found that the said defendant was justly indebted to this plaintiff in the said sum of       dollars for the services aforesaid (j) [or otherwise, according to the facts].

[Or, where the award is in writing the pleader may substitute for this paragraph the following: III. That thereafter said arbitrator, having undertaken the arbitration, duly made and published his award in writing, of which the following is a copy; or, a copy of which is hereto annexed and marked "Exhibit B."]

IV. That the plaintiff duly performed all the conditions thereof on his part, (k) and [afterwards, and on or about the

(g) An averment that an arbitrator made an award means a *qualified* arbitrator, and sufficiently imports that he was duly sworn, where an oath is required. *Browning v. Wheeler*, 24 *Wend.*, 258.

(h) An allegation that an award was made, imports that it was ready to be delivered. *Munro v. Allaire*, 2 *Cal.*, 320.

Where the award was required to be delivered to the parties, alleging that it was ready to be, and was delivered to the plaintiff, it is bad. *Pratt v. Hackett*, 6 *Johns.*, 14.

(i) Where a submission is oral and does not provide for a written award, an oral award is good at common law. *Valentine v. Valentine*, 2 *Barb. Ch.*, 430.

(j) It was the rule at common law, that in an action upon an award the

plaintiff need not set forth more than is in his favor and sufficient to support his demand. He need not show the award upon both sides; and if there be any thing by way of condition precedent to the payment of the money, the defendant must set it forth in pleading. *McKinstry v. Solomons*, 2 *Johns.*, 57; *Diblee v. Best*, 11 *Id.*, 103.

(k) Performance of the conditions of an award must, under the Code, be pleaded, as well as in the case of those of a contract. The exception to this general rule, which, before the Code, prevailed in respect to pleading upon an award, is no longer to be observed. *Cole v. Blunt*, 2 *Bosw.*, 116. It may be better to allege performance in the terms of the award rather than in the general form above given.

## On Awards.

day of           , 18   , at           ] gave notice of said award to the defendant, and demanded (Z) of him payment of the said sum of           dollars.

V. That the defendant then and ever since has refused to pay the same; and there is now due from the defendant to the plaintiff thereon, the sum of           dollars, with interest from, &c.

350. *On an Award of an Umpire. (m)*

*Substitute for the first part of paragraph III. in the preceding form:* That said M. N. & O. P. [arbitrators], before they proceeded upon the said arbitration, on the           day of           , 18   , by writing, under their hands, appointed one Q. R. to be

Where one party is directed to pay money on or before a certain day, and the other to convey and give up possession on or before that day, or the like, the acts are concurrent, and neither can recover without performance or tender. *Huy v. Brown*, 12 *Wend.*, 591. But where the things awarded to be done by the parties are independent, tender of performance or demand of payment before suit is not necessary. *Nichols v. Rensselaer Mutual Ins. Co.*, 22 *Wend.*, 125.

(Z) Notice of the award and demand need not be averred, unless required by the terms of the submission. 2 *Saund.*, 62, a; *Rowe v. Young*, 2 *Brod. & B.*, 233.

(m) In complaining upon an award it is of consequence to attend to the distinction between the powers and authority of a person acting with others as an arbitrator, and the powers and authority of an umpire. Where an umpire has been appointed and has entered on the performance of his duty, the authority to decide is vested solely in him; the original powers of the arbitrators cease to exist. He is not bound to meet or consult with them, though he may do so; and the award is his act alone, and if either arbitrator joins in the award

his act is superfluous, and the award is still that of the umpire only. *Underhill v. Van Cortlandt*, 2 *Johns. Ch.*, 339; *Butler v. Mayor, &c.*, of N. Y., 1 *Hill*, 489; *Mayor, &c.*, of N. Y. *v. Butler*, 1 *Barb.*, 325. But where two arbitrators unable to agree appoint, under the submission, a third arbitrator, the power to make an award is vested in the three jointly.

Wherever, therefore, the action is founded on an award, its true character, as the act of an umpire or of arbitrators, must be set forth in the complaint, in order that a defence adapted to its true character may be set up in the answer. *Lyon v. Blossom*, 4 *Duer*, 318. In that case the complaint averred a submission to two with power in case of disagreement to appoint an umpire; and alleged a disagreement, the appointment of an umpire, and an award by a majority of the three. The submission offered in evidence contained a power to appoint, not an umpire, but a third party to assist in the arbitration; and the award was made by one of the original arbitrators with the new appointee. It was held that this submission and award could not be received in evidence, that there was a material variance between the evidence and the

## Complaints on Awards. On Bonds.

umpire in the matter so submitted; and the said arbitrators, after hearing the plaintiff and defendant, and not being agreed concerning the matters submitted, the said Q. R. afterwards undertook said arbitration, and heard the plaintiff and defendant, and on the            day of            [*proceed to allege the award as in preceding form*].

351. *Allegation of an Enlargement of the Time.* (n)

That on the            day of            , 18            [*or, thereafter, and within the time limited for making the award*], the plaintiff and defendant by agreement [*in writing, of which a copy is hereto annexed, and marked "Exhibit O"*], extended the time for making the award until the            day of            .

## ARTICLE III.—BONDS.

[In actions upon penal bonds, the judgment is in form for the penalty, and execution is to be issued from time to time only for the amounts due. (o) Hence the demand of relief must be for the penalty.]

If the bond is for the breach of any condition, other than for the payment of money, as well as in actions for any penal sum for the non-performance of any covenant or written agreement, the plaintiff's complaint must assign the specific breaches for which the action is brought. (p) The other class of bonds may be pleaded in the general form given for instruments for the Payment of Money only. *Ante*, § VIII., p. 209.

complaint, which could not be disregarded without prejudice to the defendant's rights.

(n) Where the submission provided that the award should be made in December, but on the day the parties, by erasure and interlineation, extended the time to a day in January,—*Held*, that the award might be counted upon as made at the time of its date, instead of at the time of the alteration. *Tompkins v. Corwin*, 9 *Cow.*, 255.

(o) *Western Bank v. Sherwood*, 29 *Barb.*, 383; *Mayor, &c., of N. Y. v. Lyons*, 24 *How. Pr.*, 280; and see *Syracuse City Bank v. Coville*, 19 *Id.*, 385.

(p) This was the rule established by the Revised Statutes (2 *Rev. Stat.*, 378, § 5). This statute is still in force under the Code. *Western Bank v. Sherwood*,

29 *Barb.*, 383. This rule extends to every kind of condition, excepting one that the obligor will pay a certain sum of money at a particular time, or in specified instalments. A bond conditioned that a third person shall pay, in a certain contingency, or on demand, or an uncertain sum, is not a bond for payment of money within the statute; and breaches must be assigned. *Nelson v. Bostwick*, 5 *Hill*, 37. So a bond given on a plea of title before a justice, conditioned to appear in a court of record, is within this rule, and specific breaches must be assigned. *Patterson v. Parker*, 2 *Id.*, 598. But it does not apply to a bond merely for the payment of money by instalments. *Harmon v. Dedrick*, 3 *Barb.*, 192; and see *Spaulding v. Millard*, 17 *Wend.*, 331.

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 Mode of Pleading on Bonds.
 

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Where the doing of a single act will be a compliance with the covenant or condition, the breach is well assigned if it be in the words of the contract, or in words of the same substantial import; but where there are several things necessary to the performance of it, a particular breach must be assigned. (*q*)

Where the cause of action on the bond is regarded as entire, but the pleader assigns several breaches, they may appropriately be stated in separate paragraphs; those after the first commencing with the words: And for a second breach; And for a third breach, &c.

Where the case is regarded as presenting several causes of action, the instrument may be pleaded with the facts which create one cause of action; and in the statement of the subsequent causes of action it will be enough to refer to, without repeating, the allegations concerning the instrument.]

## I. BONDS FOR PAYMENT OF MONEY ONLY.

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- 353. By a surviving obligee in a joint bond..... 268
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(*q*) Thus, in an action on an official bond, assigning as a breach that he did not well and faithfully execute, &c., in the words of the bond, is not enough. He should not be required to come prepared to justify his whole official conduct. *People v. Brush*, 6 *Wend.*, 454; *People v. Russell*, 4 *Id.*, 570.

But it is enough to say generally that the defendant had collected or embezzled, &c., such a sum, which he had refused, &c., without setting forth the particular items, which would lead to prolixity. *Postmaster-general v. Cochran*, 2 *Johns.*, 413; *Hughes v. Smith*, 5 *Id.*, 168. .

So, to say that plaintiff has been obliged to pay to the amount of, &c., in consequence of the negligence and acts of the defendant in his office of under sheriff, is good, at least on general demurrer. *Hughes v. Smith*, *Id.*, 168.

So, declaring on a sheriff's bond, for the non-payment of money received by him for military fines, it is not necessary to name who paid the money to him, or issued the warrants on which it was collected; a reference to the statute makes the breach certain enough. *People v. Brush*, 6 *Wend.*, 454.

Compare, also, Section XIV., *infra*.

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 Analysis of the Section.
 

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## V. OFFICIAL BONDS.

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## I. BONDS FOR PAYMENT OF MONEY ONLY.

352. *Common Form.*

I. That on the            day of            , at            , the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [*state the penalty*].

II. That no part thereof has been paid. (*r*)

Wherefore the plaintiff demands judgment against the defendant for [*the penalty*].

353. *By a Surviving Oblige in a Joint Bond.* (*s*)

I. That on the            day of            , at            , the defendant covenanted with the plaintiff and one C. D., under his hand and seal, to pay to the plaintiff and said C. D. [*proceed as in other forms*].

II. That on the            day of            , at            , said C. D. died.

III. [*Allege breach as in other cases.*]

354. *On a Bond for the Payment of Money only, Pleading it According to its Legal Effect.* (*t*)

I. That on the            day of            , 18            , at            , the defendant covenanted with the plaintiff, under his hand and seal,

(*r*) It is suggested in *Western Bank v. Sherwood* (29 *Barb.*, 383), that specific breaches should be assigned in all cases under the Code, even on a mere money bond. See a form appropriate to this view, No. 355.

(*s*) One of two joint obligees cannot sue, unless he avers that the other is dead. Wherever, by reason of a sev-

eral interest, one may sue, he must set forth the bond truly, and then, by proper averments, show a cause of action in himself alone, clearly embraced within the condition of the bond. *Ehle v. Purdy*, 6 *Wend.*, 629.

(*t*) This form may be preferable where the plaintiff is entitled to recover more than the penalty.

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 On Bonds.
 

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to pay to the plaintiff the sum of [*state, not the penalty, but the actual debt*], on the       day of       , with interest from, &c. [*or, as follows*:       dollars thereof on the       day of       , and       dollars thereof on the       day of       , with interest on each of said sums from, &c. *or otherwise, according to the condition*].

II. That no part of the same has been paid [except the sum of, &c.] Wherefore the plaintiff demands judgment against the defendant for the sum of [*state the amount due*].

## II. ON BONDS OTHER THAN FOR THE PAYMENT OF MONEY.

### 355. *Common Form.*

I. That the defendant, on the       day of       , 18       , made his bond or writing obligatory, sealed with his seal, of which the following is a copy: [*set forth copy of bond, including condition*].

II. [*Set forth a breach: see following forms.*]

III. For a further breach the plaintiff alleges, &c.

### 356. *Another form, for Cases where the Condition is Contained in an Instrument which Cannot Conveniently be Set Forth.*

I. That on the       day of       , at       , the defendant covenanted with the plaintiff, under his hand and seal, to pay to the plaintiff the sum of [*state the penalty*].

II. That said obligation was upon the express condition thereunder written [whereby after reciting that, &c., it was provided], that if, &c. [*set forth the substance or words of the condition*], the said obligation was to be void, otherwise to remain in full force.

III. [*Allege breaches, as in other cases.*]

### 357. *On a Bond for Rent; against Principal and Sureties. (u)*

I. That the plaintiffs were, at the time next hereinafter mentioned, possessed of certain issues and profits arising and accru-

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(u) This is, in substance, the com- &c., of N. Y. v. Mabie, 13 N. Y. (3  
 plaint used in the case of the Mayor, Kern.), 151.

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Complaint on Bond for Rent.

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ing from certain wharves in the city of New York, hereinafter mentioned—viz., the right to collect wharfage from such vessels as should lie against or touch at the said wharves; and being so possessed, on the            day of           , by an instrument in writing, bearing date on that day, and one part whereof was duly executed under the common seal of the city of New York, and the other part whereof was duly executed under the hand and seal of the defendant [*lessee*], the plaintiffs demised and leased to the said [*lessee*], in consideration of certain rents and covenants therein reserved and contained, the right to levy and collect to his own use all the wharfage which should or might arise, accrue, or become due between the            day of           , and the            day of           , from the use or occupation by vessels of more than five tons burden, of any of the wharves belonging to the plaintiffs, from and including the easterly side and end of the middle pier at Coenties Slip, or Pier No. 7, to and including the westerly half of Pier No. 8, or the pier on the easterly side of Coenties Slip, together with the bulkhead between said piers, and which were known as "District No. 5 of Public Docks and Slips," except certain docks, slips, wharves, piers, and places therein mentioned and excepted. And the plaintiffs further thereby authorized the said [*lessee*] to demand and receive all lawful sums of money due for wharfage thereon.

II. And the said [*lessee*] on his part covenanted to pay to the said [*plaintiffs*] the sum of            dollars, in four equal quarterly payments, on the first days of August, November, February, and May next thereafter.

III. That the said [*lessee*] on that day, in order to secure the payment of the said rent, in and by the said lease agreed to be paid, duly executed, together with the defendants [*sureties*], under their respective hands and seals, a joint and several bond, in the penalty of            dollars, conditioned for the payment of the rents in said lease reserved unto the said [*plaintiffs*] at the times at which they should respectively fall due.

IV. That the said [*lessee*] entered upon the said premises, and collected and retained for his own use and benefit and behoof, of the wharfage thereof, under and in pursuance of the said lease for the full term thereof, but has neglected and failed to pay the full amount due to the [*plaintiffs*] under the said lease, but that there is still due and unpaid for rent thereon



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 On Bond for Servant's Fidelity.
 

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from the said [*lessee*], the sum of            dollars (*v*), with interest upon the sum of            dollars from, &c., upon the sum of, &c.

V. [*State the demand on principal, notice to surety, and demand on surety, where these facts are necessary.*]

358. *On a Bond for the Fidelity of a Clerk, or Cashier.*

I. That on the            day of           , 18   , at           , the plaintiffs being then about to employ one M. N. as a clerk [*or*, to appoint one M. N. as their cashier], the defendants, under their hands and seals, covenanted with the plaintiffs that if the said M. N. should not faithfully perform his duties as such clerk [*or*, cashier] to the plaintiffs, or should fail to account to the plaintiffs for all moneys, evidences of debt, or other property received by him for the use of the plaintiffs, the defendants would pay to the plaintiffs whatever loss they might sustain by reason thereof, not exceeding            dollars [*or otherwise, according to the condition; or say*: That on the            day of           , 18   , at           , the plaintiffs being then about to employ one M. N. as a clerk [*or*, to appoint one M. N. as their cashier], the defendants executed to the plaintiffs a bond, a copy of which is annexed].

II. That between the            day of           , 18   , and the day of           , 18   , the said M. N. as such clerk [*or*, cashier] received money and other property, amounting to the value of            dollars, to the use of the plaintiffs, for which he has not accounted to them.

359. *On a Bond for the Faithful Accounting of a Subscription Agent.*

I. That on the            day of           , 18   , at           , it was mutually agreed between this plaintiff and one M. N., that the said M. N. should canvass the cities of           , for subscribers to certain books then in course of publication in numbers by

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(*v*) In an action to recover, from the surety upon a lease, the amount of rent due, plaintiff will not be required to reduce defendant's liability by setting forth the particulars of certain sums received by him from the pre-  
ises, which the surety is entitled to have credited to him. The plaintiff is not bound in his complaint to furnish the defendant with the particulars of an offset. *Giles v. Betz*, 15 *Abbotts' Pr.*, 285.

## Complaint on Clerk's Bond.

the plaintiff, and had for sale by him to subscribers [*or*, for subscribers to the , a magazine or periodical then published by this plaintiff]; that the said M. N. should collect for account of the plaintiff the moneys which should grow due upon the subscriptions procured by him; that the plaintiff should pay to said M. N. dollars upon each order or subscription obtained by him, the same to be payable whenever numbers of the work subscribed for should have been paid for by the subscriber thereof; and that the said M. N. should faithfully account to this plaintiff for all books and parts of books intrusted to him, and should faithfully pay over to the plaintiff all the money that he should from time to time collect under the authority given him by the said agreement, exceeding his commission of dollars for each order or subscription.

II. That then and there [*or*, on the day of , 18 , at ] the defendant made and delivered to the plaintiff his bond under his hand and seal, and thereby bound himself in the penal sum of dollars to this plaintiff, the condition of which bond was, that if the said M. N. should faithfully render up, or account for, to this plaintiff, all books and parts of books and other publications and specimens, and all sums of money, evidences of debt, and things in action which should be intrusted to him by or on behalf of this plaintiff, or by or on behalf of others to the use of this plaintiff, in the course of the employment of said M. N. as a canvasser as aforesaid, up to and not exceeding the amount of dollars at any one time, then said bond should be void, otherwise it should be of full force and effect.

III. That the plaintiff did thereafter intrust and deliver to said M. N. in the course of his employment under the agreement aforesaid, certain books and parts of books of the value of dollars, for which he has failed to account to the plaintiff [*or*, that thereafter said M. N. did collect and receive divers sums of money in the course of his employment under the agreement aforesaid, exceeding his commissions, to wit, the amount of dollars, which sums he failed to render up, account for, or pay over to the plaintiff.] (*w*)

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(*w*) Where the agreement set forth less than a certain sum, and to account for the proceeds, and the declaration was to sell for not

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 On Bonds of Submission to Arbitration.
 

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IV. That on the       day of       , 18       , at       , the said M. N. was duly requested to account to this plaintiff for said books and parts of books [*or, to account for and pay over to this plaintiff such sums*], but he has not done so, of which this plaintiff gave due notice to the defendant, and thereupon demanded payment from him of the said sum of       dollars, according to the terms of said bond (x), but the same has not been paid, nor any part thereof.

### III. ARBITRATION BONDS.

#### 360. *For Refusal to Comply with Award.* (y)

I. That certain differences having arisen between the plaintiff and the defendant, in consideration thereof, and in consideration of a like bond executed by this plaintiff to the defendant, the defendant heretofore made and delivered to the plaintiff a bond of arbitration, conditioned to abide the award of M. N. upon said differences, of which bond a copy is hereto annexed, as a part of this complaint, and marked Exhibit A.

[II. That on the       day of       [*or, thereafter, and within the time limited for making the award*], by agreement of plaintiff and the defendant, the time for the making of the award was extended to the       day of       .]

III. That the said arbitrator having undertaken the arbitration on the       day of       , duly made and published his award in writing upon the matter submitted, ready to be delivered to the parties, or to such of them as should desire the same, and thereby awarded that the defendant should [*here indicate briefly the provision which the defendant has disregarded*]; of which award a copy is hereto annexed, as a part of this complaint, and marked Exhibit B.

IV. That the plaintiff duly performed all the conditions of

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ration averred a refusal to account, but did not aver any sale, it was held bad. *Wolfe v. Luyster*, 1 *Hall*, 146.

(x) As to when the allegations of demand on the principal, notice to the surety, and demand on the surety are necessary, see p. 292, note (j).

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Request is a condition precedent in bond to account on request. *Davis v. Cary*, 15 *Q. B.*, 418; *S. C.*, 69 *Eng. Com. L. R.*, 416.

(y) This form is supported by *Myers v. Dixon*, 2 *Hall*, 456; *McKinstry v. Solomons*, 2 *Johns.*, 57; 13 *Id.*, 27.

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 Complaints on Bonds.
 

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said bond on his part [and on the            day of            , gave notice of said award to the defendant, and tendered to him, &c., and demanded of him, &c.]

V. That the defendant has not [*here allege breach, specifying the particular act or omission*].

### 361. *For Revoking the Arbitrator's Powers.* (z)

[*Allege submission, as in preceding form.*]

III. That thereafter, and before the matters aforesaid were finally submitted to said arbitrator, the defendants by writing under their hands and seals, delivered to            , revoked the powers of the arbitrators.

### IV. BONDS GIVEN IN SUITS. (a)

#### 362. *On a Bond of Security for Costs.*

I. That heretofore one M. N. commenced an action in this court [or, in the            court] against this plaintiff, wherein such proceedings were had, as that, on the            day of            , the defendants above named executed under their hands and seals, and duly filed with a clerk of said court, for the benefit of this plaintiff [*or, where the bond was directed to be given under section 317, and where it is directed to be delivered to plaintiff instead of being filed under section 423, duly executed, pursuant*

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(z) Where defendant revoked the arbitrator's powers, before the submission was actually made a rule of court, the plaintiff should assign the revocation as a breach—not the non-performance of the award. *Frets v. Frets*, 1 *Cow.*, 335. This form is further supported by *Williams v. Maden*, 9 *Wend.*, 240.

(a) In an action on a statute security, if the complaint, by averring that it was sealed, imports a consideration, it is not necessary that it should also show that it was within the statute. *Clark v. Thorp*, 2 *Bosw.*, 680. Where it appears that the instrument was given in pursuance of a statute requirement, in a

form prescribed thereby, and in a case within the statute, those facts constitute a sufficient consideration to support it, though it be without seal, and no further averment of consideration is necessary. *Slack v. Heath*, 4 *E. D. Smith*, 95; *S. C.*, 1 *Abbotts' Pr.*, 331.

A declaration upon a statutory security,—*e. g.*, a replevin bond,—need not aver that it was taken in pursuance of the statute. It is enough that the instrument set forth is in accordance with the statute. *Shaw v. Tobias*, 3 *N. Y.* (3 *Comst.*), 188. See, further, the forms of Complaints on Undertakings and notes thereto, *infra*.

## On Attachment Bonds.

to an order of said court, made the            day of           , 18   , and delivered to the plaintiff a bond], whereby they bound themselves, their heirs, executors, and administrators, in the penal sum of            dollars, to this plaintiff; the condition of which bond was such, that if the said M. N. should pay on demand all costs that might be awarded to this plaintiff in the action aforesaid, then the above obligation should be void, otherwise it should remain in full force and virtue [*or otherwise, according to the condition; or, refer to a copy annexed*].

II. That such proceedings were thereafter had in said action, as that this plaintiff, on the            day of           , 18   , recovered judgment therein against the said M. N. for            dollars, his costs and expenses of defending said action.

III. That on the            day of           , 18   , at           , this plaintiff duly demanded payment of the said judgment from the said M. N., (*b*) but no part thereof has been paid.

363. *On a Bond Given to Obtain Discharge of an Attachment Under the Absconding Debtor Act. (c)*

I. That before and at the several times hereinafter mentioned, the plaintiffs were partners in business, carrying on their business in the city of New York, under the name and firm of A. B. & Co.; and M. N. and O. P., hereinafter mentioned, were also partners in business, and carried on the same in the city of Vera Cruz, in Mexico, under the name and firm of N. & P.

II. That the said M. N. and O. P. being indebted to the plaintiffs as hereinafter particularly stated, the plaintiffs, (*d*) on the            day of           , 18   , made application to the Hon.

(*b*) Demand upon the principal is necessary. *Nelson v. Bostwick*, 5 *Hill*, 37. But a demand upon the defendant is unnecessary. *Ernst v. Bartle*, 1 *Johns. Cas.*, 319.

(*c*) The form here given, which is the one in substance that was employed in *Renard v. Hargous* (2 *Duer*, 540; 13 *N. Y.* (3 *Kern.*), 259), is adapted to an action on a bond given under 2 *Rev. Stat.*, 12, § 55, to procure a discharge of an attachment issued against a non-

resident debtor, under the provisions of the act relative to absconding, concealed, and non-resident debtors. *Id.*, 3-14. It may easily be modified to meet the case of any other attachment. As to undertakings under the Code of Procedure, see Forms, *infra*.

(*d*) In an action on an attachment bond, executed on the discharge of a warrant, issued under the Absconding and Non-resident Debtor Act, it is not necessary to aver or prove that the at-

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 Complaint on Attachment Bond.
 

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, one of the justices of this court, pursuant to the statute, for an attachment against the real and personal estate of the said M. N. and O. P., as non-resident debtors.

III. That said application was in writing, and was duly verified by the oath of one of the plaintiffs, and stated in substance and effect that the said M. N. and O. P. were respectively non-residents of this State, and that they were indebted to the plaintiffs in the sum of        dollars, over and above all discounts, arising upon a contract; and the grounds upon which such application was made were also duly verified by the affidavit of two disinterested witnesses, according to the statute, (e) as by said application, now remaining with the said justice, will, on reference thereto, fully appear.

IV. That the said justice did thereupon duly issue an attachment against the estate, real and personal, of the said non-resident debtors, directed to the sheriff of       , and thereby commanded him to attach and safely keep all the estate, real and personal, of the said non-resident debtors within his county (except such articles as were by law exempt from execution), with all books of account, vouchers, and papers relating thereto; and did also order a notice thereof to be published, according to the statute, as, by the said attachment, and the order for publication of notice thereof, will, on reference thereto, fully appear.

V. That the sheriff of       , to whom said attachment was so directed and delivered, did, in obedience thereto, attach in due form of law certain property and effects of the said non-resident debtors, within his county.

VI. That thereupon the defendants, on or about the day of       , 18       , in order to discharge the said attachment, did execute to these plaintiffs, and deliver to the said justice for the use of these plaintiffs, their bond, under their hands and seals, bearing date on the last-mentioned day, of which the following is a copy: [*copy bond*].

VII. That upon presenting the said bond to the said justice, with the consent of the plaintiffs' attorney indorsed thereon, the

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taching creditor resided in this State. plaintiff. *Dormday v. Kanouse*, 2 N. Y. The execution of the bond makes a *Leg. Obs.*, 330. *prima-facie* case on the part of the (e) 2 *Rev. Stat.*, 138, §§ 4, 5.

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Given under Absconding Debtor Act.

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said attachment was duly discharged, and the said bond was afterwards delivered over to these plaintiffs.

VIII. That on or about the            day of           , 18   , the plaintiffs caused to be delivered to the said M. N. and O. P., as their factors and agents, ten bales of twilled cottons, and forty bags cocoa, belonging to the said plaintiffs, to be sold by them, and the proceeds thereof, after deducting the usual charges for commissions and expenses, accounted for and paid over to the said plaintiffs.

IX. (*f*) These plaintiffs further state, upon information and belief, that on the            day of           , 18    [*or*, that thereafter and before the            day of           , 18   , but on what particular day or days they are not informed and cannot state], the said M. N. and O. P. sold the said forty bags of cocoa to one            [*or*, to some person or persons to these plaintiffs unknown], the net proceeds whereof, after deducting all commissions and charges thereon, amounted to the sum of            dollars, which sum the said M. N. and O. P. thereupon [*or*, and O. P., on the            day of           , 18   ], received.

X. These plaintiffs further state, upon information and belief, that on the            day of           , 18    [*or*, that thereafter, &c., *as in paragraph IX.*], the said M. N. and O. P. sold the said ten bales of twilled cottons to one            [*or*, to some, &c., *as in paragraph IX.*], the net proceeds whereof, after, &c. [*continue as in paragraph IX., to the end*].

XI. (*g*) And the plaintiffs further state, that on the last-mentioned day [*or*, on the            day of           , 18   ], they duly demanded payment of the said sums from the said M. N. and O. P., but no part of them has been paid.

XII. That at the time of executing the aforesaid bond, the

(*f*) In paragraphs IX. and X. we have departed from the mode of pleading adopted in *Renard v. Hargous*, giving the particulars of the sales alleged more fully and in detail than was there done. In an action directly against the factor, an averment that a sale was made, though couched in much more general language than that adopted above, would be sufficient, the subject-matter of the averment being within

the factor's knowledge. But as against the surety, it may be that although averments sufficient to charge the principal are also sufficient to enable him to answer as to the sale, he is entitled to have furnished him in the complaint such convenient details as the plaintiff may be able to supply.

(*g*) This paragraph was not contained in the complaint in *Renard v. Hargous*. As to its necessity, see Forms 238, 239.

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Complaint on Attachment Bond.

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said plaintiffs were attaching creditors of the said M. N. and O. P., according to the statute; and that the amount above specified was then justly due and owing by the said M. N. and O. P. to these plaintiffs; and that the indebtedness hereinbefore mentioned is the same as that which was sworn to by these plaintiffs at the time of issuing the above-mentioned attachment.

XIII. That these plaintiffs have incurred costs and disbursements therein amounting to            dollars, no part of which has been paid, of which defendants had notice.

364. *On a Bond given to Procure the Discharge of an Attachment against a Vessel.* (h)

I. That on the            day of           , 18   , M. N. and O. P., who were then copartners in the trade and business of ship-builders, in the city of           , under the name and firm of, &c., and who were then, as the plaintiff is informed and believes, the owners of a certain unfinished and unnamed ship or vessel, then, and at the time of the application hereinafter mentioned, lying upon the stocks in the course of construction in the ship-yard occupied by the said N. & P., at           , contracted a debt with the said plaintiff, amounting to the sum of            dollars, for certain materials or articles furnished by the said plaintiff, in this State, towards the building of the said vessel.

II. That afterwards, and on the            day of           , 18   , the said N. & P., who then, also, as the plaintiff is informed and believes, were such copartners as aforesaid, and such owners of the said unfinished and unnamed ship or vessel, contracted a certain other debt with the said plaintiff, amounting to the sum of            dollars, for other materials or articles furnished by the said plaintiff, in this State, towards the building of the said ship or vessel.

III. That the said materials or articles for which said debts were so contracted were certain cedar logs, furnished by the said plaintiff, to and at the request of the said N. & P., at           , at the times respectively hereinbefore stated, towards the building of the said vessel; and that the amount of such debts, that

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(h) This form is supported by *Phillips v. Wright*, 5 *Sandf.*, 342.



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Given under Shipping Lien Act.

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is to say, the sum of            dollars, together with interest thereon, was justly due to the plaintiff, at the time of the application hereinafter mentioned.

IV. That having a lien upon the said ship or vessel for the sum of            dollars, and interest thereon, he did heretofore, and on the            day of           , 18   , make application to Hon.           , one of the justices of this court, pursuant to the statute, that such lien might be enforced, and that a warrant might be issued to the sheriff of, &c.

V. That thereupon such warrant was issued by the said justice to the said sheriff, whereby he was, among other things, commanded to attach, seize, and safely keep the said ship or vessel, her tackle, apparel, and furniture, to answer the said plaintiff's lien, and all other liens that should be established against her, according to law.

VI. That the said sheriff, in pursuance of the said warrant, attached and seized the said vessel, and that afterwards, and on or about the            day of           , 18   , the above-named defendants applied to the said justice for, and obtained, an order to discharge the said warrant, and that thereupon the defendants executed and delivered, and the said justice received as a sufficient security therefor, a bond to the said plaintiff, of which the following is a copy: [*copy bond*]. (i)

VII. That the plaintiffs' aforesaid claims were a subsisting lien on the said ship or vessel, at the time of the exhibition thereof, as hereinbefore mentioned.

VIII. That no part of the same has been paid.

365. *On a Bond given to Procure a Stay of Proceedings,—for Reformation of a Mistake in it, and for Judgment upon it as Reformed.* (j)

I. That on the            day of           , 18   , the plaintiffs recovered a judgment against one M. N. in the            Court of this

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(i) Since a sealed bond imports a consideration, an omission to allege that the bond was delivered to the officer, or that the defendants obtained a discharge of the vessel thereupon, does not render the complaint demurrable. *Clark v. Thorpe*, 2 *Bosw.*, 680

(j) A complaint seeking to have a written contract reformed, and for judgment thereon when reformed, states but a single cause of action. *Gooding v. McAlister*, 9 *How. Pr.*, 123.

Both legal and equitable relief, if not inconsistent, may now be sought in

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Complaint on Bond, seeking to Correct Mistake.

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State, in and for the county of \_\_\_\_\_, for the sum of \_\_\_\_\_ dollars, in an action wherein these plaintiffs were plaintiffs and said M. N. was defendant.

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, pending the proceedings of the plaintiffs, supplementary to execution on said judgment, to collect the same from said M. N., he, the said M. N., moved said court to have the judgment satisfied of record.

III. That thereupon, and at the request of said M. N., the plaintiffs, by their attorneys, stipulated with him that if he would give them security for the payment of said judgment, to wit, the bond of some third person, conditioned for the payment by M. N., upon demand, if his said motion was denied, of the amount due on said judgment, they would stay such proceedings to collect the judgment until the determination of the court upon such motion.

IV. That in pursuance of such stipulation said M. N. thereupon caused to be drawn a bond, of which a copy is hereinafter set forth, which he represented to the plaintiffs that he intended to have executed by one O. P., in the body thereof named as the obligor therein.

V. That on the day limited by said stipulation for the delivery of said bond, said M. N. represented to the plaintiffs that said O. P. was out of town, and that access could not be had to him to obtain the execution by him of said bond, and the said M. N. thereupon offered to procure such a bond to be executed by the defendant Y. Z., instead of by said O. P., which these plaintiffs thereupon consented to receive.

VI. That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, in consideration of the premises and of the stipulation of these plaintiffs to stay proceedings as aforesaid, the defendant Y. Z., at the city of New York, executed and delivered to these plaintiffs his bond in writing, under his hand and seal, of which the following is a copy: [*copy of the bond, with name of O. P. in the title, but signed by Y. Z., the defendant*].

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one action. *Getty v. Hudson River R. R. Co.*, 6 *How. Pr.*, 269; *Gooding v. McAlister*, 9 *Id.*, 123; *Spier v. Robinson*, *Id.*, 325; *Mott v. Dunn*, 10 *Id.*, 225; *Jeroliman v. Cohen*, 1 *Duer*, 629; See *v. Partridge*, 2 *Id.*, 463; *Rodgers v. Rodgers*, 11 *Barb.*, 595; *Cahoon v. Bank of Utica*, 7 *N. Y.* (3 *Seld.*), 486; and see *Linden v. Hepburn*, 3 *Sandf.*, 668; *S. C.*, 5 *How. Pr.*, 188; 9 *N. Y. Leg. Obs.*, 80; and *Haire v. Baker*, 5 *N. Y.* (1 *Seld.*), 357.

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 On Official Bonds. Executors and Administrators.
 

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VII. That the striking out of the name of said O. P. from the bond as prepared for execution, and the insertion instead thereof of the name of said Y. Z., were accidentally omitted, by mistake of the parties to said bond, and that the name of said O. P. remained therein contrary to their intention.

VIII. That thereupon the plaintiffs stayed proceedings, as agreed, until the determination of the court upon said motion.

IX. That thereafter the determination of said court was duly made, that the said motion be denied, and that the whole amount of said judgment was still due and owing to the plaintiffs from the said M. N.

X. That on the            day of           , 18   , payment of the amount due on said judgment was duly demanded of said M. N.; but no part thereof has been paid, and there is now justly due to these plaintiffs from said M. N. thereon the sum of            dollars, with interest from said 22d of November, 1855, of al- which the defendant had due notice. (*k*)

XI. That thereafter, and on or about the            day of           , 18   , said bond was duly presented to said Y. Z. and payment thereof demanded; (*l*) but no part thereof has been paid, and there is now due thereon from the defendant to these plaintiffs the sum of            dollars, with interest from, &c.

Wherefore the plaintiffs demand judgment that said bond be reformed by striking out therefrom the name of said O. P., and inserting in the place thereof the name of the defendant Y. Z., as the obligor therein; and that the said defendant pay to the plaintiffs the sum of            dollars, with interest from, &c.

## V. OFFICIAL BONDS.

### 366. *On an Administration Bond. (m)*

I. That on the            day of           , the defendants, together with [*the administrators*], made and delivered to the surrogate of           , their bond in writing, under their hands and seals, and thereby bound themselves to the People of this State, in the penal sum of            dollars, with a condition that if said

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(*k*) Where notice is material, an averment of facts "which defendants well knew," is not sufficient. *Colchester v. Brooks*, 7 *Q. B.*, 339; *S. C.*, 53 *Eng. Com. L. R.*, 339.

(*l*) As to necessity of demand on the principal, and notice to the obligor, and demand on him, see Form 379, note (*j*).

(*m*) This form is supported by *People v. Falconer*, 2 *Sandf.*, 81.

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Complaint on Administration Bond.

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[*administrators*] should faithfully execute the trust reposed in them, as administrators of all and singular the goods, chattels, and credits of M. N., late of \_\_\_\_\_, in the State of \_\_\_\_\_, deceased, and should obey all orders of the surrogate of the county of \_\_\_\_\_, touching the administration of the estate committed to them, then the obligation was to be void; otherwise in full force.

II. That after the execution of the bond, and on the same date, letters of administration were issued accordingly to said [*administrators*], by an order duly made by the surrogate of, &c.

III. That said administrators [or one of them], converted to their own use, assets of the estate of the intestate, which came to their hands as such administrators, (n) to the amount of \_\_\_\_\_ dollars, in violation of the trust so reposed in them.

IV. For a further breach. That after the execution of the bond, and after the expiration of eighteen months, the said administrators were required to render an account of their proceedings by an order duly made on the \_\_\_\_\_ day of \_\_\_\_\_, by the surrogate of the county of \_\_\_\_\_; and that thereupon they did account before such surrogate, on, &c.

V. That such proceedings were had upon such accounting, that the surrogate adjudged and decreed, by an order duly made on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_, that Y. Z., one of the administrators, had in his hands, of the assets of the estate of M. N., a balance of \_\_\_\_\_ dollars, and by the same decree the said surrogate ordered said Y. Z. to pay one-third of such balance, being \_\_\_\_\_ dollars, to F. R., the widow of the intestate, as and for her distributive share of the estate; but that said Y. Z. has not obeyed the order, and no part of said sum has been paid. (o)

VI. For a third breach the plaintiff alleges, that the surrogate, at the same date, duly made another decree, by which he

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(n) In an action against the surety on an administration bond, it is not necessary for the plaintiff to describe the property which came into the hands of the administrator, and which he had converted, the creditor not being presumed to know precisely what it was. The non-payment of a judgment ob-

tained against the administrator, may be assigned as a breach of the condition of such bond. *People v. Dunlap*, 13 *Johns.*, 437.

(o) Notice to the representative, and a demand upon him, are not always essential. *People v. Rowland*, 5 *Barb.*, 449.

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 On County Treasurer's Bond.
 

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ordered said Y. Z. to pay to J. R. two-thirds of the balance so decreed against him, being            dollars, as and for [&c.], but that he has not obeyed said order, and no part of said sum has been paid.

VII. That said F. R. and J. R. were adults, and entitled to receive the same [except           , who was a minor and had a guardian, who was entitled to receive the same].(p)

VIII. That thereupon, on the            day of           , 18   , the surrogate of the county of           , by an order then duly made, directed the bond to be prosecuted; and according to the provisions of the statute, an action has accrued to the plaintiffs.(q)

*367. Assignment of Breach of the Bond of a County  
Treasurer.(r)*

That said treasurer, between the            day of           , and the            day of           , received various sums of money as such treasurer, amounting to about the sum of            dollars [being a part of the tax raised in his county for the year           ], and that he fraudulently, and in breach of his trust, converted and appropriated to his own use said sum.(s)

For a further breach, the plaintiff alleges that said treasurer,

(p) *People v. Rowland*, 5 *Barb.*, 449.

(q) In an action upon the bond of an executor or administrator, the plaintiff must show, as a part of his cause of action, that the case is one of those in which the surrogate is authorized to direct the prosecution of the bond. *People v. Barnes*, 12 *Wend.*, 493; *People v. Corlies*, 1 *Sandf.*, 228; but we apprehend, that in pleading it under the Code (§ 160) it is enough to allege it as above. It is not necessary to aver notice to the sureties, nor to state who was the applicant for the order for prosecution. *People v. Falconer*, 2 *Sandf.*, 81. Execution issued under the Act of 1837, 535, ch. 460, § 35, and return unsatisfied, and assignment of the bond, need not be alleged here.

The remedies are cumulative. *People v. Guild*, 4 *Den.*, 551; *People v. Laws*, 3 *Abbotts' Pr.*, 450.

(r) Where the condition of a treasurer's bond was, that he "should keep a separate account in the Bank of A., as such treasurer, of all moneys," &c.,—*Held*, that a breach might be assigned by negating the words of the condition, though only nominal damages could be recovered under it. *Albany Dutch Church v. Vedder*, 14 *Wend.*, 165.

(s) Where a county treasurer has embezzled and converted money of the county, it is not necessary for the supervisors to make a request or demand before a suit on his bond. *Supervisors of Allegany v. Van Campen*, 3 *Wend.*, 48.

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 Sheriff's Bond.
 

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on the            day of            , accounted with the plaintiffs concerning moneys [raised in his county for defraying the public and necessary charges thereof] which had come to his hands as said treasurer, and on such accounting was found to be in arrear, and indebted to the plaintiffs in the further sum of            dollars, and that on the            day of            , the plaintiffs demanded that he pay the same over to them, but he refused so to do, and no part thereof has been paid.

368. *Assignment of Breach in a Sheriff's Bond, for Neglect to Levy.*

That on the            day of            , in an action brought by him against one M. N., the relator recovered judgment, duly given by the Court of            , against said M. N., for the sum of            dollars [which judgment was on, &c., duly docketed in the office of the clerk of the county of, &c.]

That on the            day of            , an execution in favor of the relator against the property of said M. N. was duly issued on said judgment, and delivered to the said sheriff, of which the following is a copy: [*or state its effect*].

That said sheriff did not execute said process, but although there was then within his county real and personal property (t) of which he might have levied, the moneys thereby directed to be levied [and of which he had notice], (u) he neglected and refused so to do, whereby the relator lost his said debt.

That on the            day of            , leave was granted to the relator by the Supreme Court at            , to prosecute said bond by reason of the premises.

369. *The Same, for Neglect to Sell after Levy. (v)*

[*Allege judgment and execution, as in preceding form.*]

That the said sheriff by virtue thereof, on the            day of            , levied on the goods of said M. N., of the value of           

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(t) In an action against sureties in a constable's bond, an allegation that the constable did not levy the amount, nor take the body, is not sufficient without any averment that the defendant had

property which might have been levied upon, or that his body could have been found. *Lawton v. Erwin*, 9 *Wend.*, 233.

(u) The allegation of notice, though

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On Sheriff's Bond. On Building Contracts.

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dollars; but he neglected to advertise and sell the goods so levied on by him as aforesaid, and no part of the moneys directed to be collected on the relator's said execution has been received by the relator.

370. *The Same, for Neglect to Return.*

[*Allege judgment and execution, as in Form 368, continuing:*] who by virtue thereof, on the            day of           , levied on the goods of said M. N., of the value of            dollars; but, although more than sixty days elapsed after its delivery to him and before this action, wholly neglected and failed to make return of said execution, and no part of the moneys directed to be collected thereby has been received by the relator.

371. *Allegation of Judgment for Damages and Costs against the Sheriff.*

That thereafter, and on and about the            day of           , in an action brought by the plaintiff in the            Court, he recovered against a judgment duly given against the said sheriff for the sum of            dollars, for the damages which the relator had sustained by the neglect of the sheriff to execute [or, return] said process, and            dollars costs of his said action, and no part thereof has been paid to the relator.

ARTICLE IV.—BUILDING CONTRACTS.

372. *On a Special Contract, (w) modified by Parol, with Claim for Extra Work.*

*First.* For a first cause of action.

I. That on the            day of           , 18   , at           , the defendants, under their hands and seals, made a contract in writing

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usual, seems unnecessary. Tomlinson v. Rowe, *Hill & D. Supp.*, 410.

(v) This form is supported by People v. Ten Eyck, 13 *Wend.*, 448. It is appropriate where the writ was delivered to a deputy, as well as where it was delivered to the sheriff.

(w) In setting forth the contract or its modifications, an averment may be made sufficiently certain by introducing and referring to diagrams showing form and dimensions, &c. *Booker v. Ray*, 17 *Ind. (Harrison)*, 522.

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 Alleging Performance.
 

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with the plaintiff, of which the following is a copy: [*copy contract*].

II. That thereafter, and before the            day of           , 18   , the plaintiff duly performed all the conditions thereof on his part, (x) except that at the request of the defendants he covered

(x) After a contract is modified, the declaration must not be upon the original contract alone. *Freeman v. Adams*, 9 *Johns.*, 115; *Baldwin v. Munn*, 2 *Wend.*, 399; *Langworthy v. Smith*, *Id.*, 587; *Phillips v. Rose*, 8 *Johns.*, 392. But a mere parol extension is not an alteration which is necessarily material to the cause of action. *Crane v. Maynard*, 12 *Wend.*, 408. If a new contract was substituted, the original should not be pleaded. *Chesbrough v. N. Y. & Erie R. R. Co.*, 26 *Barb.*, 9.

In the case of a modified contract, we conceive that the plaintiff may plead in either of two ways: first, he may set forth the contract, not in *hæc verba*, as originally written, but according to legal effect as modified, and then aver that he "has duly performed all the conditions thereof on his part;" or second, he may set forth a copy of the contract as written, and then state that he has duly performed, &c., all the conditions thereof on his part, except that in certain points it was subsequently modified, and that in those points he fulfilled it according to the modifications. But it is not sufficient to allege that the plaintiff has fulfilled all the conditions of the contract in every respect, except wherein the same were afterwards waived and altered by the direction, consent, or negligence and fault of the defendant (but without stating what the modifications were), and that the plaintiff had performed the contract as modified. *Smith v. Brown*, 17 *Barb.*, 431. It is held, that where the pleader does not adopt the method of averring performance authorized by section 162, he will be held to the strictness required by the old

rules of pleading performance of conditions. *Hatch v. Peet*, 23 *Id.*, 575. It seems to be a fair construction of this section to consider the pleader entitled to aver in this way performance of all the conditions performance of which he wishes to aver, and to state as exceptions those conditions performance of which he does not wish to aver, together with his excuse for non-performance of them. Such is the form given above, but the practitioner will not follow it without observing that it may be objected to it that in one sense it does not literally comply with the requirements of section 162, in that it does not aver performance of *all* the conditions. The objection does not commend itself to our view, but we do not find that it has been passed upon.

For the old rules for averring performance of conditions precedent, see 1 *Chit. Pl.*, 283, ed. 1828; *Hatch v. Peet*, 23 *Barb.*, 575.

In an action on a contract to pay for work, if done to the satisfaction of defendant, it is not necessary to aver that it was done to his satisfaction, if it is shown to be according to the contract; but if the contract requires it to be done to the satisfaction of third persons, the plaintiff must aver that it was done to their satisfaction. *Butler v. Tucker*, 24 *Wend.*, 447. Under a building contract which provides for payment when the architect should furnish a certificate "that the work was fully and completely finished according to the specifications," the giving of a certificate to that effect must be averred and proven. *Smith v. Briggs*, 3 *Den.*, 73. Where the money was to be paid upon a certificate by an officer that the work had



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 On Building Contract.
 

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the roof of the building in the above contract mentioned with slate instead of shingles, for which the defendant promised to pay a reasonable sum (y) in addition to the price named in said contract; and that at the like request he omitted to put blinds upon the rear of the building, on the agreement with the defendants that a reasonable deduction should be made from the price named in said contract for such omission; and that by the consent of the defendant the time for completing said work was extended for one month after the day named in said contract, to wit, to the            day of           , 18   , on which day the whole of said work was completed by the plaintiff.

III. That the sum of            dollars is a reasonable payment to be made in addition to the price named in said contract, for covering said roof with slate instead of shingles.

IV. That the sum of            dollars is a reasonable deduction to be made from the price named in said contract for the omission to put blinds upon said building.

V. That on the            day of           , 18   , at           , payment of the sum of            dollars, being the balance due on said contract after making such allowance and such deduction, was duly demanded of the defendants by the plaintiff, but no part thereof has been paid (z) [except the sum of, &c.]

*Second.* And for a second cause of action. (a)

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been performed, a petition alleging that he had made such certificate, need not aver also that the work had been performed. *Towsley v. Olds*, 6 *Clarke (Iowa)*, 526. Averring that the defendants demanded possession, which the plaintiff delivered up to them, is not a sufficient averment of acceptance on the part of the plaintiff. *Smith v. Brown*, 17 *Barb.*, 431.

Where the plaintiff does not rely on performance of a condition precedent, but on facts excusing non-performance, he should aver the excuse, stating the particular circumstances which constitute it.

(y) If the promise was to pay a certain sum or at a certain rate, state the sum here, and omit paragraph III., and so of the next averment.

(z) The complaint should aver a breach, as this is not "an instrument for the payment of money only," and cannot be pleaded in the form prescribed in the latter clause of section 162. The averment of a demand may be omitted wherever no demand is necessary as the foundation of the breach, except where it is desired to prove a demand, to charge the defendant with interest.

(a) Whether extra work is to be stated as a separate cause of action or not, must depend upon the circumstances of the case. If it was done as a consequence of a modification of the contract, it is to be treated as done under the contract, and forming one cause of action with other work done under the contract. If it was done in addition to,

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 Complaints for Extra Work. On Charter-parties.
 

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I. That between the                      day of                      , 18                      , and the day of                      , 18                      , at                      , he rendered further services to the defendants at their request in [*here state extra work done, and materials furnished therefor*], for which the defendants promised to pay (b) [so much as they should be reasonably worth.

II. That the same are reasonably worth]                      dollars, which sum became due therefor on the                      day of                      , 18                      , but no part thereof has been paid.

## ARTICLE V.—CHARTER-PARTIES. (c)

373. Ship owner against charterer; for freight.....	p. 288
374. The same, a shorter form .....	289
375. The same, against assignee of cargo.....	289
376. For not loading.....	289
377. For demurrage.....	290
378. Charterer against owner, for abandoning the voyage.....	290

 373. *Ship-owner against Charterer, for Freight.* (d)

I. That at                      , on or about                      , the plaintiff and defendant agreed by charter-party that the plaintiff's ship called                      should, with all convenient speed, sail to                      , and that the defendant should there load her with a full cargo of                      , or other lawful merchandise, which she should carry to                      , and there deliver, on payment by the defendant to the plaintiff of freight at                      dollars per ton, \* one-half of such freight, to be paid in cash on unloading and right delivery of the cargo; and the remainder by approved bills on                      , at                      months, or in cash less                      per cent. discount, at the defendant's option.

II. That afterwards the said ship accordingly sailed to                      ,

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but independently of the written contract, it is more properly to be treated as a second cause of action, based upon an independent verbal contract. Where the extra work is matter of account, it will be better to use Form 269 as a statement of the cause of action. As to the necessary allegations where the contract forbids extra work, see p. 206, note (g).

(b) If the sum was agreed on, omit the words in brackets.

(c) As to allegations in a complaint by owners of a vessel, for the breach of a clause in the charter-party binding the hirers to keep her in repair, see *Coster v. N. Y. & Erie R. R. Co.*, 3 *Abbotts' Pr.*, 332; S. C., 6 *Duer*, 43.

(d) This form is from *Bullen & L. F.*, 79; *Isberg v. Bowden*, 8 *Each.*, 852.

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On Charter-parties ;—Against Charterer.

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aforesaid, and was there loaded by the defendant with a full cargo of lawful merchandise, and the plaintiff carried the said cargo in said ship to aforesaid, and there delivered the same to the defendant.

III. That said freight amounted in the whole to the sum of dollars, and the defendant paid to the plaintiff one-half of said freight in cash, and all conditions were fulfilled, and all things happened, and all times elapsed which were necessary to entitle the plaintiff to maintain this action; yet that † the defendant did not pay to the plaintiff the remainder of said freight, either by such approved bills as aforesaid, or in cash, less discount as aforesaid.

374. *The Same, a Shorter Form.*

I. [*As in preceding forms.*]

II. That the plaintiff duly performed all the conditions on his part, (e) but that no part of said freight has been paid [except the sum of, &c.]

375. *The Same, against Assignee of Cargo.*

I. That at , on or about , the plaintiff and one M. N. agreed by charter-party [*continue as in paragraph I. of Form 373, substituting the charterer's name for the word "defendant?"*].

II. That thereafter the said M. N. assigned the cargo [*or, the charter-party and cargo*] to the defendant, who thereupon became the owner thereof and entitled to receive the same.

III. [*Continue as in Form 373, paragraphs II. and III.*]

376. *For Not Loading. (f)*

I. That on , at , the plaintiff and defendant agreed by charter-party that the defendant should deliver to the plaintiff's ship , at , on the day of , 18 , tons of [merchandise], which she should carry to , and there deliver, on payment of dollars freight; and that the defendant should be allowed days for loading, and

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(e) *Code of Pro.*, § 162.  
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(f) This form is from *Bullen & L. F.*, 80.

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Complaints on Charter-parties.

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days for discharging, and days for demurrage, if required, at dollars per day.

II. That the plaintiff duly performed all the conditions on his part, but the defendant made default in loading the agreed cargo, and failed to provide it, to the plaintiff's damage dollars.

377. *For Demurrage. (g)*

I. [*As in preceding form.*]

II. That the plaintiff duly performed all the conditions on his part.

III. That the defendant kept the said ship on demurrage days over and above the periods so agreed upon for loading and discharging as aforesaid, but has not paid the same; and that the defendant also detained the ship days beyond the periods so agreed on for loading, discharging, and demurrage as aforesaid, whereby the plaintiff during all that time was deprived of the use of the ship, and incurred dollars expense in keeping the same and maintaining the crew thereof.

378. *Charterer against Owner, for Abandoning the Voyage.*

I. That on or about , at , the plaintiff and defendant agreed by charter-party that the defendant's ship called , then at , should, with all convenient speed, having liberty to take an outward cargo for owner's benefit, sail to , or so near there as she could safely get, and there load from the plaintiff [*or, the factors of the plaintiff*] a full cargo of , or other lawful merchandise, which he should carry to , and there deliver, on payment of freight [certain perils and casualties in the said charter-party mentioned only excepted.

II. That the plaintiff duly performed all the conditions on his part.

III. That said ship was not prevented by any of said perils or casualties from completing said outward voyage;] (*h*) but that

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(g) This form is from *Bullen & L. F.*, exceptions in the charter-party. *Wheeler v. Bavidge*, 9 *Exch.*, 668; S. C., 25 *Eng. L. & Eq. R.*, 541.

(h) It is not essential to negative the

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 Against Sureties for Rent.
 

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she did not with all convenient speed sail to \_\_\_\_\_, or so near thereto as she could safely get; and the defendant caused the said ship to deviate from her said voyage and abandon the same, to the plaintiff's damage \_\_\_\_\_ dollars.

## ARTICLE VI.—GUARANTIES. (i)

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380. Against principal and sureties, in contract for work and services .....	292
381. On an agreement to be answerable for the price of goods sold to a third person .....	293
382. On a guaranty of a precedent debt.....	294
383. Against the guarantor of a mortgage, to recover deficiency after foreclosure .....	295

*379. Against Sureties for Payment of Rent.*

I. That on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, one M. N., by agreement in writing with this plaintiff, hired of the plaintiff [*very briefly designate the premises, e. g., thus, the building No. 100 Broadway, in the city of New York*], at the yearly rent of \_\_\_\_\_ dollars, payable [quarterly] on the \_\_\_\_\_ days of, &c.

II. That the defendant, in consideration of the premises and of one dollar to him paid, and as security for the punctual payment of said rent, then and there subscribed and delivered to the plaintiff an agreement in writing, of which the following is a copy: [*copy of guaranty; or say, an agreement in writing, and thereby agreed that if any default should be made therein, he would pay to the plaintiff such sum or sums of money as should be sufficient to make up such deficiency and fully satisfy the conditions of said agreement, without requiring any notice of non-payment, or proof of demand made*].

III. That said M. N. has made default in the payment of the sum of \_\_\_\_\_ dollars, which was due for said rent on, &c.

IV. That before the commencement of this action [and on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_], the plaintiff [duly demanded of said M. N. payment thereof, and gave to the defendant due notice and proof of said demand and non-payment, and then

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(i) For complaints in actions by pal moneys paid to his use, see. *ante* guarantor, to recover from his princi- 170-172, &c

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Actions upon Contracts for Payment of Money.

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and there] duly demanded payment from the defendant of said sum; but no part thereof has been paid. (j)

(j) In the case of an absolute guaranty,—i. e., an undertaking that the debtor shall pay within a given time, and if not, that the defendant will himself pay it,—demand on the principal and notice to the guarantor is not necessary. *Allen v. Rightmere*, 20 *Johns.*, 365; *Mann v. Eckford*, 15 *Wend.*, 502; *Kemble v. Wallis*, 10 *Id.*, 374; *Clark v. Burdett*, 2 *Hall*, 197; *Rushmore v. Miller*, 4 *Edw.*, 84; *Van Rensselaer v. Miller*, *Hill & D. Supp.*, 237; *McKensie v. Farrell*, 4 *Bosw.*, 192; but compare *Mechanics' Fire Ins. Co. v. Ogden*, 1 *Wend.*, 137.

Where one guaranties the act of another, though on condition, his liability is commensurate with that of his principal, and he is no more entitled to notice of the default than the latter, unless the act is beyond his inquiry. *Douglass v. Howland*, 24 *Wend.*, 85.

On a general guaranty that the debtor will pay, demand upon the debtor is not necessary to fix the liability of the surety, unless the surety has requested the creditor to pursue him, or unless the creditor's delay has been the cause of injury to the surety. *Clark v. Burdett*, 2 *Hall*, 197; *Union Bank v. Coster*, 3 *N. Y. (3 Comst.)*, 203.

Where one guaranties to make satisfaction, if it cannot be obtained in a reasonable time from his principal, a demand on the principal is not necessary, if it be shown that it would have been useless because he was insolvent. *Morris v. Wadsworth*, 11 *Wend.*, 100. See, also, *Cooke v. Nathan*, 16 *Barb.*, 342.

Engaging that if the holder of a note should not be able to collect it from the maker in a due course of law, the guarantor would consider himself responsible without requiring notice of non-payment, is a waiver of demand of

the maker. The agreement only requires the plaintiff to enforce the note by collection by due course of law. *Backus v. Shipherd*, 11 *Wend.*, 629.

To show due diligence in suing in another State, on a contract, the laws of such State regulating the contract must be averred, unless the pleader can rely on the common-law rules. *Mendenhall v. Gately*, 18 *Ind. (Kerr)*, 149.

If one guaranties a debt to be collected by himself, the complaint need not show demand on the principal debtor: otherwise in a complaint against one who merely guaranties a debt which the creditor is to collect. *Milliken v. Byerly*, 6 *How. Pr.*, 214.

To maintain an action upon a guaranty that a judgment is collectible, proceeding for the collection in the due course of law is a condition precedent, and its performance or excuse must be alleged. *Mains v. Haight*, 14 *Barb.*, 76.

If the guaranty is to pay if the principal do not pay on demand, a demand on the principal must be averred and proved. *Douglass v. Rathbone*, 5 *Hill*, 143; *Bank of N. Y. v. Livingston*, 2 *Johns. Cas.*, 409; *Nelson v. Bostwick*, 5 *Hill*, 37. And it is only necessary to show a suit against the principal where the terms of the guaranty necessarily imply that the liability of the guarantor is dependent upon that. *Morris v. Wadsworth*, 17 *Wend.*, 103; affirming *S. C.*, 11 *Id.*, 100; *Backus v. Shipherd*, *Id.*, 629; but see *Cooke v. Nathan*, 16 *Barb.*, 342.

Where the guaranty is to pay the debt of P. on request, if he does not pay, a special request of the defendant must be averred and proved. *Bush v. Stevens*, 24 *Wend.*, 256; *Nelson v. Bostwick*, 5 *Hill*, 37; *Douglass v. Rathbone*, *Id.*, 143.

## Against Sureties.

380. *Against Principal and Sureties in Contract for Work and Services. (k)*

I. That heretofore certain articles of agreement were made and entered into between the plaintiff, of the first part, and the said defendant W. of the second part, under their respective hands and seals, and bearing date the       day of       , 18       , of which a copy is hereto annexed as a part of this complaint, and marked Exhibit A.

II. That on the       day of       , 18       , simultaneously with said agreement, and in consideration thereof, the said defendants X., Y., and Z. executed an agreement in writing, under their respective hands and seals, written at the foot of said agreement, of which a copy is hereto annexed as a part of this complaint, and marked Exhibit B.

III. That the plaintiff afterwards duly performed all the conditions of the said contracts on his part, and that the same were fully completed on the       day of       , 18       , and that on that day he was entitled to have and receive from the said defendant W., and the said defendants X., Y., and Z., upon the said contract, for the said work, a large sum of money, viz., the sum of       dollars.

IV. That the said defendants have wholly failed to perform the said contracts on their parts, and have wholly neglected and refused to pay the said sum of       dollars, (l) and are now indebted to the plaintiff, upon the said contract, in the sum aforesaid, with interest from, &c.

(k) This form is from *Van Santo. Prec.*, 420. In this State it is held that the principal and sureties who engage by different instruments, although written upon the same paper, should not be joined as parties in one action. *De Ridder v. Schermerhorn*, 10 *Barb.*, 638; *Allen v. Fosgate*, 11 *How. Pr.*, 218; overruling *Enos v. Thomas*, 4 *Id.*, 48. The contrary, however, is held in Iowa, under a similar statute, *Marvin v. Adamson*, 11 *Iowa*, 371. They may, however, be joined where they engage by one instrument. *Carman v. Plass*, 23 *N. Y.*, 286.

(l) In an action upon a guaranty by the defendant that a third person would fulfil an executory agreement for the purchase of land, an averment that the principal "failed to fulfil his obligations by virtue of said instrument," is not sufficient; nor is an averment that plaintiff had recovered judgment against the principal "on account of his failure to fulfil his obligations." The facts as they occurred, and not the legal conclusions which are sought to be drawn from them, ought to be pleaded. *Van Schaick v. W.*, 16 *Barb.*, 89.

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 Actions upon Contracts for Payment of Money.
 

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 381. *On an Agreement to be Answerable for the Price of Goods Sold to a Third Person.*

I. That on the            day of           , 18   , at           , in consideration that the plaintiff, at the request of the defendant, would sell to one M. N., on a credit of            months, such goods as said M. N. should desire to buy of this plaintiff [*or other consideration*], (*m*) the defendant promised to be answerable to the plaintiff for the payment by said M. N. of the price of goods so sold on credit [*if the amount of the guaranty was limited, add, to an amount not exceeding a total credit of            dollars at any one time, or otherwise as the limit may have been*]. (*n*)

II. That this plaintiff afterwards, and on the faith of said guaranty, sold and delivered (*o*) to said M. N. [*designate briefly the goods sold*], for the sum of            dollars, upon a credit of            months, which sum became due therefor from said M. N. to this plaintiff on, &c.

III. That payment of the same was thereafter duly demanded from said M. N., but the same was not paid; of all which due notice was given to the defendant.

IV. That on the            day of           , 18   , at           , payment of the same was duly demanded by the plaintiff from the defendant, but no part thereof has been paid [*except the sum of, &c.*] (*p*)

(*m*) A consideration should be stated in every action on a promise. *Bailey v. Freeman*, 4 *Johns.*, 280. In an action on a sealed undertaking to answer for the debt of another, the seal imports a consideration, and no other need be alleged in pleading. *Bush v. Stevens*, 24 *Wend.*, 256.

(*n*) Where the promise was collateral, and not an original one, so as to be within the Statute of Frauds, it may be added, "and that a memorandum of said agreement was thereupon made in writing expressing the consideration thereof, and was subscribed by the defendant, of which the following is a copy:" [*copy of the memorandum*]. But

this is not necessary, see p. 209, *ante*, note (*a*).

(*o*) In an action on a surety's absolute promise to pay, if the principal does not pay in a certain time after delivery to the latter, tender and refusal on the part of the principal, being equivalent to a delivery, may be averred specially in lieu of a delivery; and this notwithstanding he subsequently accepted a delivery. *Kemble v. Wallis*, 10 *Wend.*, 374.

(*p*) Or, instead of the last two allegations, say: III. That the plaintiff has duly performed all the conditions thereof on his part, but no part of said sum has been paid.



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 Against Guarantors.
 

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 , 382. *On a Guaranty of a Precedent Debt.*

I. That on the            day of            , 18    , at            , one M. N., being then indebted to this plaintiff in the sum of            dollars, which sum was then [*or*, on the            day of            , 18    , became] due and payable to the plaintiff, the defendant made and subscribed a memorandum in writing, of which the following is a copy: [*copy of the guaranty*];—and delivered the same to the plaintiff [*or*, made and subscribed a memorandum in writing, expressing the consideration thereof; *or*, under seal, and thereby promised to the plaintiff to answer to him for said debt].

II. That the plaintiff duly performed all the conditions thereof on his part, and there is now due to him thereon from the defendant the sum of            dollars, with interest from, &c. (*q*)

 383. *Against Guarantor of Mortgage, to Recover Deficiency after Foreclosure. (r)*

I. That on or about the            day of            , 18    , the defendants entered into an agreement in writing with the plaintiff, under their hands and seals, of that date, in the words and figures following: [*copy of agreement*].

II. That the principal sum secured by the bond and mortgage referred to in the said agreement, became due and payable on, &c., and that on or about, &c., the plaintiff commenced an action in the Supreme Court for the county of            for the foreclosure of said mortgage, the principal sum thereof, with interest, not having been paid; and such proceedings were thereupon had, that on the            day of            , 18    , a decree or judgment-order in said action was made by the said court, for the foreclosure of the said mortgage and sale of the premises; and that if the proceeds of such sale should be insufficient to pay the amount reported due to the plaintiff, with interest and costs, the amount of such deficiency should be

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(*q*) If the guaranty is not set forth, *smith v. Brown* (35 *Barb.*, 484), but the but only its effect, allege “that no recovery is limited by the sum actually part thereof has been paid.” paid.

(*r*) This form is sustained by *Gold-*

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Actions upon Contracts for Payment of Money.

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specified in the report of sale therein, and W., one of the defendants therein, should pay the same to the plaintiff.

III. That pursuant to said decree or judgment-order, the premises were duly sold on, &c., by the sheriff of, &c., for the price or sum of, &c. [and that the plaintiff became the purchaser thereof].

IV. That, upon said sale, there occurred a deficiency of, &c., as appears by the sheriff's report of said sale, duly filed in the office of the clerk of, &c., and that thereupon, to wit, on the                      day of                      , 18                      , a judgment was rendered in said court against W. in favor of the plaintiff, for the said sum of, &c., with interest from                      , 18                      , of which no part has ever been paid.

V. That before the commencement of this action, he demanded of the defendants payment of the amount of such deficiency, and at the same time tendered to them an assignment of said judgment against W., duly executed by the plaintiff, but that the defendants refused to pay the same, and have ever since neglected and refused to pay the same, although the plaintiff has always been, and still is, ready and willing to deliver to said defendants an assignment of said judgment upon being paid the amount due thereon.

## ARTICLE VII.—INSURANCE.

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## On Insurance Policies.

## I. FIRE POLICIES.

384. *By the Insured. (s)*

I. That the defendants are a corporation duly created by and under the laws of this State [*or, the State of, &c.*], organized pursuant to an act of the Legislature [*of said State*] entitled [*title of the act*] passed [*date of passage*] and the acts amending the same.

II. That on the            day of           , 18   , at           , in consideration of the payment by the plaintiff to the defendants of the premium of            dollars, the defendants by their agents duly authorized thereto, made their policy of insurance in writing, a copy of which is annexed as a part of this complaint, (*t*) and marked Exhibit A., and thereby insured the plaintiff (*u*) against loss or damage by fire to the amount of            dollars upon his [dwelling-house and his furniture therein], in the village of M.

III. That at the time of making said insurance [*or, at the time of the commencement of the risk*], and from then until the fire hereinafter mentioned, the plaintiff had an interest (*v*) in the property insured, as the owner [*or, mortgagee, or otherwise*] thereof, to an amount exceeding the amount of said insurance [*or, exceeding the sum of.            dollars*].

IV. That on the            day of           , 18   , said dwelling-house and furniture were totally destroyed (*w*) [*or, damaged, and in part destroyed*] by fire, which did not happen by [*the causes excepted in the policy*]. (*v*)

(*s*) This form is approved in *Rodi v. Rutgers Fire Ins. Co.*, 6 *Bosw.*, 23.

(*t*) Formerly it was customary to set out at length in the declaration, the policy and the memorandum of conditions annexed. The more convenient way of pleading it is to annex a copy of the policy and memorandum as an exhibit, and to refer to it in the complaint. *Fairbanks v. Bloomfield*, 2 *Duer*, 349.

(*u*) In an action by the mortgagor on a policy of insurance issued to him, but in terms payable to the mortgagee, the complaint must aver that the mortgage

has been paid, or must join the mortgagee as a party. *Ennis v. Harmony Fire Ins. Co.*, 3 *Bosw.*, 516.

(*v*) As to the necessity of averring interest and negating the exceptions, see Form 392, notes (*i*), (*j*), *infra*.

(*w*) Averring that the plaintiff, within the term of the insurance, "did sustain loss to the amount of, &c., by reason of a fire taking place in the cellar of the said premises above-mentioned," is not sufficient. It should be stated that the property insured, was injured by fire. *Rodi v. Rutgers Fire Ins. Co.*, 6 *Bosw.*, 23

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Actions on Contracts for the Payment of Money—Insurance.

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V. That the plaintiff duly fulfilled all the conditions of said insurance on his part [and more than sixty days, *or, as otherwise required by the policy*, before the commencement of this action, to wit, on the            day of           , 18   , at           , gave to the defendants due notice and proof of the fire and loss aforesaid, and duly demanded payment of the said sum of, *stating the amount of the loss if less than the amount insured; but if greater, then the amount insured*]. (x)

VI. That no part of the same has been paid, and the said sum is now due thereon from the defendants to the plaintiff.

385. *The Same, where the Insurance was a Renewal.*

[*As in the preceding form, inserting after paragraph II. the following:*]

III. That on the            day of           , 18   , at           , the defendants by their agents duly authorized thereto, in consideration of            dollars to them paid by this plaintiff, executed and delivered to this plaintiff their certificate of renewal of said policy, of which the following is a copy: [*copy of the certificate*], [*or, a copy of which is annexed as a part of this complaint, and marked Exhibit B.*], and thereby renewed said insurance for the term of one year from said            day of, &c.

386. *The Same, where the Plaintiff Purchased the Property after the Insurance.*

[*As in Form 384, substituting, in the averment of the policy, the name of the original insurer in place of the words "the plaintiff;" and the following instead of paragraph III.*]

III. That at the time of making said insurance [*or, at the time of the commencement of the risk*], and from then until the assignment hereinafter mentioned, said [*original insured*] had an interest in the property insured as the owner [*or, mortgagee, or otherwise*] thereof, to an amount exceeding the amount of said insurance [*or, exceeding the sum of            dollars*].

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(x) The general averment in the first    under section 162 of the Code of Procedure. two lines of this paragraph is sufficient

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 On Fire Policy.
 

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IV. That on the            day of            , 18    , with the consent of the defendants duly given in writing on said policy by their said agents, the said [*original insured*] duly sold, assigned, and conveyed to the plaintiff his interest in the said [*property insured*], and in the policy of insurance [*continue as in Form 384, paragraphs IV., V., and VI.*]

387. *The Same, Correcting an Alleged Mistake. (y)*

I. That he was the owner of, &c., in, &c., at the time of its destruction by fire, as hereafter mentioned.

II. That on the            day of            , 18    , at            , in consideration of            dollars to them paid, the defendants executed to the plaintiff a policy of insurance on the said property, a copy of which is hereto annexed as a part of this complaint.

III. That on the            day of            , 18    , the said property was totally destroyed by fire.

IV. That the plaintiff's loss thereby amounted to more upon each part of the property separately insured, than the amount of such separate insurance.

V. That on the            day of            , 18    , he furnished the defendant with proof of his said loss and interest, and other wise duly performed all the conditions of the said policy on his part.

VI. That no part of the said loss has been paid.

VII. That the survey referred to in the said policy, and made a part of the same, contains, among others, the following questions and answers: [*copy*].

VIII. That the said questions and answers were not meant or understood, by either of the parties, to be a warranty.

IX. That the plaintiff, by his answers aforesaid, did not mean, nor did the defendant understand him to represent, that there was, &c.; but the defendant then knew that no, &c.; and if the said questions and answers do in law convey such an idea, it is through mistake only.

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(y) This form is from those reported cases, see *Lamoreaux v. Atlantic Mutual Ins. Co.*, 3 *Duer*, 680.  
by the commissioners of the Code. As to the proper demand of relief in such

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Actions on Contract for Payment of Money—Insurance.

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388. *By the Assignee of the Insured, on an Agreement to Insure, Policy never having been Delivered.* (z)

I. [*Incorporation of defendants may be stated, as in Form 384.*]

II. That on and before the                      day of                      , 18                      , the Winstead Manufacturing Company, a corporation established at, &c., by their agent applied to M. N., the duly authorized agent of the defendants, for insurance against loss or damage by fire upon a certain stock of merchandise, the property of said Winstead Manufacturing Company, consisting of scythes contained in a building of the said Winstead Manufacturing Company, occupied for storing, blacking, bluing, and packing scythes, in said Winstead. And the defendants, by their said agent, on said day agreed to become an insurer to said company on the said stock for three months from the said day, for dollars at a premium of                      , and that the said defendants would execute and deliver to the said Winstead Manufacturing Company a policy of insurance in the usual form of policies issued by them, the said defendants, for the sum of                      dollars, for the term of three months from the said day.

III. That the said Winstead Manufacturing Company then and there paid to the defendant said premium, to wit, dollars.

IV. That it was then and there agreed between the said Winstead Manufacturing Company and the said defendants, that the said insurance should be binding on the part of the defendants for the term of three months from the time of the receipt of the said premium, for the sum of                      dollars, and the said defendants then and there, in consideration of the premises, promised and agreed to and with the said Winstead Manufacturing Company, to execute and deliver to them, in a reasonable and convenient time, a policy in the usual form of their policies,

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(z) This is in substance the complaint in *Rockwell v. Hartford Fire Ins. Co.*, 4 *Abbotts' Pr.*, 179. It was held in that case that where there is an agreement to insure and to deliver a policy, and a loss occurs before the delivery of a policy, it is not necessary that the in-

sured should proceed to compel the delivery of a policy before he can recover the insurance, but he may maintain an action upon the agreement and the loss, taking judgment for payment of the amount due only.

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On an Agreement to Insure.

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insuring the said stock of goods in the sum of                      dollars against loss and damage by fire, the insurance to commence at the time of the receipt of the said premium, and continue for the said term of three months.

V. That the defendants, by a policy of insurance issued in their usual form (among other things), do promise and agree [*here set out legal effect of the contemplated policy; e. g.*] to make good unto the insured all such immediate loss or damage, not exceeding in amount the sum insured, as shall happen by fire to the property insured, within the time for which the insurance is made, the loss or damage to be estimated according to the actual cash value of the property at the time the loss shall happen; the loss to be paid within sixty days after notice and proof thereof made by the insured, and received at the defendants' office in conformity to the conditions annexed to the policy. And by one of the conditions usually annexed to such policy, it is provided that all persons insured by the defendants and sustaining loss or damage by fire, are forthwith to give notice thereof to the company, and as soon after as possible to deliver in a particular account of such loss or damage, signed with their own hands and verified by their oath or affirmation; and shall also declare on oath whether any and what other insurance has been made on the same property; what was the whole value of the subject insured; what was their interest therein, and (among other things) in what general manner the building insured or containing the subject insured, and the several parts thereof, were occupied at the time of the loss, and when and how the fire originated, so far as they know or believe; and by another condition it is stipulated, on the part of the defendants, that payment of losses shall be made in sixty days after the loss shall have been ascertained and proved, and the proof received at the office of the company.

VI. That after the insurance so made, and after the said promise to execute and deliver a policy in conformity thereto, and within the said term of three months, for which the said Winsted Manufacturing Company was so insured, to wit, on the day of                      , 18                      , the said stock of merchandise in the said building mentioned and intended to be so insured, was damaged and in part destroyed [*or, was totally destroyed*] by fire,

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Actions on Contract for Payment of Money—Insurance.

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and that the said Winsted Manufacturing Company thereby sustained loss and damage to a large amount, to wit, to the amount of        dollars, and to more than the sum of        dollars over and above all insurance thereon.

VII. That said Winsted Manufacturing Company duly fulfilled all the conditions of said agreement and insurance on their part (a) [and more than sixty days, *or otherwise as required by the policy*, before the commencement of this action, to wit, on the        day of       , 18       , (b) at       , gave to the defendants due notice and proof of the loss as aforesaid, and duly demanded payment of the said sum of        dollars].

VIII. That no part of the same has been paid.

IX. That on the        day of       , 18       , at       , the said Winsted Manufacturing Company duly assigned to this plaintiff the said agreement and insurance, and their claim against the defendants thereon, of which the defendants had due notice. (c)

## II. LIFE POLICIES.

### 389. *By Executor.*

I. [*For allegation of incorporation of defendants, see Form 384.*]

II. That on the        day of       , 18       , at       , in consideration of the payment by one M. N. to the defendants, of the premium of        dollars [annually during his life], the defendants, by their agents duly authorized thereto, made their policy of insurance in writing, a copy of which is annexed as a part of this complaint, and marked "Exhibit A," and thereby insured the life of said M. N. in the sum of        dollars.

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(a) The original complaint in this case avers in detail compliance with all the conditions precedent, in the old form. The more convenient way is to aver due performance of all the conditions precedent, as above, under section 162.

(b) Where the complaint averred that the property insured was destroyed by fire on the 20th of May, 1852, and that as soon as possible thereafter, that is to say, on the 24th of May, 1852, the

plaintiffs gave notice thereof to the defendants,—*Held*, that the plaintiffs were not precluded by the terms of their complaint from showing on the trial that the proper notice was given on the morning of the 21st. *Hovey v. American Mutual Ins. Co.*, 2 *Duer*, 554.

(c) If the assignment was before the performance of the conditions precedent, allege performance as in *Form 385*, instead of paragraph VII



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On Life Policy, Payable to Third Person.

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III. That on the            day of           , 18   , at           , said M. N. died, which death was not caused by [*the causes excepted in the policy*].

IV. That thereafter, and before this action [*or, on the day of           , 18*], said M. N. died, leaving a will, by which the plaintiff was appointed the sole executor thereof [*or, this plaintiff and C. D. were appointed executors thereof*].

V. That on the            day of           , 18   , said will was duly proved and admitted to probate in the office of the surrogate of the county of           , and letters testamentary thereupon were thereafter duly issued and granted to the plaintiff, as sole executor, by the surrogate of said county; and this plaintiff thereupon duly qualified as such executor, and entered upon the discharge of the duties of his said office.

VI. That said M. N. and the plaintiff each duly fulfilled all the conditions of said insurance on his part.

VII. That no part of the same has been paid, and the said sum is now due thereon from the defendants to the plaintiff, as such executor.

### 390. *By Wife, Partner, or Creditor, Insured.*

I. [*For allegation of incorporation, see Form 384.*]

II. That on the            day of           , 18   , at           , in consideration of the payment by the plaintiff to the defendants of the [annual] premium of            dollars, the defendants, by their agents duly authorized thereto, made and delivered to the plaintiff their policy of insurance upon the life of M. N., a copy of which is annexed as a part of this complaint, and marked "Exhibit A;" and thereby insured the life of said M. N. in the sum of            dollars, payable to the plaintiff.

III. That the plaintiff was then the wife of said C. B. [*or, the partner of said C. B., in the business of, &c., or, a creditor of said C. B. to the amount of            dollars, stating facts showing his interest in the life*], and as such had a valuable interest in the life of said M. N.

IV. That on the            day of           , 18   , at           , said M. N. died, which death was not caused by [*the causes excepted in the policy*].

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Actions on Contract for Payment of Money—Insurance.

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V. That said M. N. and the plaintiff each duly fulfilled all the conditions of said insurance on their part.

VI. That no part of the same has been paid, and the said sum is now due thereon from the defendants to the plaintiff.

*391. By the Assignee in Trust for the Wife of the Insured.*

I. [*For allegation of incorporation of defendants, see Form 384.*]

II. That on the            day of           , 18   , at           , in consideration of the payment by one M. N., to the defendants, of the premium of            dollars [annually during his life], the defendants, by their agents duly authorized thereto, made their policy of insurance in writing, a copy of which is annexed as a part of this complaint, and marked "Exhibit A;" and thereby insured the life of said M. N. in the sum of            dollars.

III. That on the            day of           , 18   , the said M. N. [with the written consent of the defendants, by their said agents, duly indorsed on the policy, *or otherwise state such consent as is required by the terms of the policy*] duly assigned (*d*) said policy of insurance to this plaintiff in trust for L. N., his wife. (*e*)

IV. That up to the time of the death of M. N. all premiums accrued upon said policy were duly paid. (*f*)

V. That on the            day of           , 18   , at           , said M. N. died, which death was not caused by [*the causes excepted in the policy*].

VI. That said M. N. and the plaintiff each duly fulfilled all the conditions of said insurance on their part [and the plaintiff,

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(*d*) The assignee for value of a policy of insurance effected by the assignor upon his own life is entitled, upon the death of the assignor, to recover the whole amount insured, without reference to the consideration paid by him for the assignment. *St. John v. American Mutual Life Ins. Co.*, 2 *Duer*, 419; 13 *N. Y.* (3 *Kern.*), 31. The averment that the assured "duly assigned" is sufficient. *Fowler v. N. Y. Indemnity Ins. Co.*, 23 *Barb.*, 148.

(*e*) The assignee of a life policy in

trust for the wife of the insured, may, upon the death of the latter, sue in his own name as trustee of an express trust for the sum insured. Neither the wife nor the personal representatives of the insured are necessary parties. *St. John v. American Mutual Life Ins. Co.*, 2 *Duer*, 419; *S. C.*, 12 *N. Y. Leg. Obs.*, 265.

(*f*) This allegation is not necessary in addition to the general allegation of due performance of all the conditions authorized by section 162.

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 On Valued Marine Policy.
 

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more than sixty days, *or as otherwise required by the policy*, before the commencement of this action, to wit, on the day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, gave to the defendants due notice and proof of the death of said M. N. as aforesaid, and duly demanded payment of the said sum of \_\_\_\_\_ dollars].

VII. That no part of the same has been paid, and the said sum is now due thereon from the defendants to the plaintiff.

## III. MARINE POLICIES.

 392. *On a Valued Policy on Ship or Cargo.*

I. *For allegation of incorporation, see Form 384.*

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, in consideration of the premium of \_\_\_\_\_ dollars, then and there paid to them by the plaintiff [*or, which this plaintiff then and there agreed and became liable to pay to the defendants*], (g) the defendants, by their agents duly authorized thereto, made their policy of insurance in writing, of which a copy is annexed as a part of this complaint, and marked "Exhibit A," \* and thereby insured for him \_\_\_\_\_ dollars upon the ship [*or, upon the cargo, or, certain goods, then laden, or, about to be laden, upon the ship*], \_\_\_\_\_, then lying in the harbor of, &c. [*or as the case was*], for a voyage from \_\_\_\_\_ to \_\_\_\_\_, against the perils of the seas [*or, the perils of fire, mentioning the perils which occasioned the loss*], and other perils in the policy mentioned.

III. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the said ship sailed from said \_\_\_\_\_ on the voyage described in the policy, (h) and while proceeding therein [*or, during said voyage and while lying in the port of, &c.*], was by the perils of the seas wrecked and totally lost [*or, was burned and wholly destroyed by fire*]. (i)

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(g) The complaint must aver payment, or a liability to pay the premium. 2 *Greenl. on Ev.*, §§ 376, 381; *Phil. on Ins.*, 611. were laden, and their loss. *Marsh on Ins.*, 3 ed., 244, 245, 278, 724.

(h) The inception of the risk is an essential fact to be proved. 2 *Greenl. on Ev.*, 382. If the insurance was upon goods to be laden, state here that they (i) It is said, that if certain risks were excepted, the loss should be so stated as to appear not to have been caused by those risks. In other words, that the complaint must show a loss of a nature intended to be covered by the

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 Actions on Contracts for Payment of Money—Insurance.
 

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IV. That the plaintiff was, at the time of the commencement of the risk and thereafter until the said loss, the owner of said [insured property, or, interested in said insured property] to an amount exceeding [the whole amount insured], to wit, dollars. (j)

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insurance. *Ellis on Fire Ins.*, 176; *Phil. on Ins.*, 618. But the plaintiff is not bound to negative all possible defences. For example, where the policy contains a provision that no camphene was to be used on the premises, it is not necessary to negative a breach of the condition, for its observance is not necessary to be proved on the trial as one of the facts constituting the cause of action. If broken, the breach is a matter of defence, to be set up by the answer. *Hunt v. Hudson River Fire Ins. Co.*, 2 *Duer*, 481. See, also, *Rucker v. Green*, 15 *East*, 288.

(j) Since the passage of the act relating to wagers, &c. (1 *Rev. Stat.*, 662, §§ 8, 9, 10), it is necessary that the plaintiff, in complaining upon a policy of insurance which, upon its face, does not show any interest in the plaintiff, should aver that the insured had an interest to be protected thereby, unless the claim was assigned to him afterwards, or unless he sues as trustee of an express trust. *Freeman v. Fulton Fire Ins. Co.*, 14 *Abbotts' Pr.*, 398. And an averment that he gave the defendants due proof of loss and of interest cannot be construed as an averment that the plaintiff had an insurable interest. *Williams v. Ins. Co. of North America*, 9 *How. Pr.*, 365. The interest of the insured is one of the facts constituting the cause of action. 2 *Greenl. on Ev.*, §§ 376, 378-381. It cannot be urged, as in the case of a contract under the Statute of Frauds, that the statute merely prescribes a rule of evidence; and it seems to be the safer practice to aver the interest when it does not distinctly appear in the policy as set forth or annexed.

See 2 *Phil. on Ins.*, 612, §§ 2018, 2019; *Ellis on Fire Ins.*, 175; note 1. This may be more briefly done by inserting after the description of the object insured,—“then, and until the loss hereinafter mentioned, the property of this plaintiff.”

Alleging that the defendants, in consideration, &c., insured him against loss, &c., on his three story and attic stone building, &c., and on a frame one-story building attached, occupied by the said insured, is a sufficient averment of interest, at least on demurrer. If the averment is too general, the defendant's remedy is by motion. *Fowler v. N. Y. Indemnity Ins. Co.*, 23 *Barb.*, 143.

In a declaration upon a policy of insurance on the cargo of a canal-boat, it was held a sufficient averment of the plaintiff's interest to allege that the insurance was “for the account and benefit of the plaintiff as a common carrier, for hire, &c.,” and a sufficient averment of the liability incurred to state that an amount of goods exceeding that mentioned in the policy was intrusted to him as a carrier, and that they were consumed by fire, and the plaintiff thereby became liable to pay to the respective owners a greater sum than that insured. It is not necessary to aver actual payment. *Van Natta v. Mutual Security Ins. Co.*, 2 *Sandf.*, 490, and see *De Forest v. Fulton Fire Ins. Co.*; 1 *Hall*, 84. And as to the form of the averment of an assignee's interest in the subject insured, see *Granger v. Howard Ins. Co.*, 5 *Wend.*, 200.

It need not be averred that the plaintiff was interested at the time of making the policy. In marine insurance,

## On Open Marine Policy.

V. That the plaintiff duly fulfilled all the conditions *(k)* of said policy of insurance on his part [and more than sixty days, *or as otherwise required by the policy*; before the commencement of this action, to wit, on the       day of       , 18       , at       , he gave to the defendants due notice and proof of the loss as aforesaid, and duly demanded payment of said sum of       dollars].

VI. That no part of the same has been paid, and there is now due from the defendants to the plaintiff thereon the sum of       dollars, with interest from, &c.

393. *The Same, on an Open Policy.*

[*As in preceding form, substituting in paragraph II. at the \**] and thereby promised to pay to the plaintiff, within       days after proof of loss and interest, all loss and damage accruing to him by reason of the destruction or injury of the ship [*or, of the cargo, or, certain goods, then laden, or, about to be laden upon the ship*], then at       , during its next voyage from       to       , whether by perils of the sea or of fire [*mentioning the perils which occasioned the loss*], or by other causes therein mentioned, not exceeding       dollars. *(l)*

an interest at the commencement of the risk is sufficient. 2 *Greenl. on Ev.*, 381, § 330; 2 *Phil. on Ins.*, 614.       tions precedent. 2 *Greenl. on Ev.*, § 383.

In an action upon a policy of insurance, upon property which is admitted to have been owned by the plaintiff when the policy was issued, the burden of proof is upon the defendants to show a subsequent alienation of the property. *Orrell v. Hampden, &c., Ins. Co., 13 Gray (Mass.)*, 431.

*(k)* Under section 162 of the Code, the first clause of paragraph V. contains a sufficient averment of the fulfillment of the conditions. All express warranties and all affirmative averments are of the nature of condi-

If the insurers waived preliminary proofs, or any other condition in the policy, the waiver should be averred instead of averring performance. See *ante*, 216, note *(d)*.

*(l)* In an action on an open policy providing that the company shall be liable for such sums as shall be specified by application, and mutually agreed upon and indorsed upon the policy, it is necessary to aver that an amount sought to be recovered had been mutually agreed upon, and indorsed upon the policy. *Crane v. Evansville Ins. Co., 13 Ind.*, 446.

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 Actions on Contracts for Payment of Money—Insurance.
 

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394. *Upon Freight.*

[*As in Form 392, substituting at the \* in paragraph II.*], and thereby insured for him                    dollars upon freight of certain goods then laden [or about to be laden] in the ship                   , then at                   , to be transported by the plaintiff from                    to                   , against the perils of the seas [*or, the perils of fire, mentioning the perils which occasioned the loss*], and other perils in the policy mentioned.

III. That on the                    day of                   , said ship sailed from                   , on the voyage described in the policy, and while proceeding thereon [*or, during said voyage, and while lying in the port of, &c.*], said goods, the freight whereof was insured, were lost by [the perils of the sea].

IV. That the plaintiff has not received any freight upon said goods, nor was any earned thereon by reason of [such loss of the vessel].

[*Or, where the freight was paid in advance.*]

IV. That the plaintiff thereupon became liable to repay [and on the                    day of                   , at                   , did repay] to the shippers of said goods, the sum of                    dollars, freight which had been advanced by them.

V. and VI. as in Form 392.

395. *Averment of Loss by Collision.*

[*Substitute for paragraph III. in preceding forms.*] III. That on or about the                    day of                   , while the said ship or vessel in said policy named [with the said goods on board], was proceeding on her said voyage, and before her arrival at her said port of destination in the said policy mentioned, another vessel, with great force and violence was carried against and ran foul of the said ship, and the said ship thereby was sunk and lost [with the said goods, which thereby were wholly lost to the plaintiff].

396. *Averment of Waiver of a Condition.*

That afterwards [and on the                    day of                   , at                   ], the defendants, by their agents duly authorized thereto, waived

## On Marine Policy.

the condition of the said policy by which [*designating it*], and released and discharged the plaintiffs from the performance thereof [*or, and consented that the plaintiffs should, &c., according to the facts*].

397. *For a Partial Loss and Contribution to General Average.* (m)

[*I. and II. as in preceding forms.*]

III. That said ship did, on the       day of       , sail on said voyage, and whilst proceeding thereon was by the perils of the seas dismasted and otherwise damaged in her hull, rigging, and appurtenances; insomuch that it was necessary for the preservation of said ship and her cargo, to throw over a part of said cargo, and the same was accordingly thrown over for that purpose.

IV. That by means thereof the plaintiff was obliged to expend       dollars in repairing said ship at       ; and, also, [*or, and is also liable to pay*]       dollars as a contribution to and for the loss occasioned by throwing over a part of said cargo.

V. That said ship also suffered much damage that was not repaired at       , to wit, to the amount of       dollars.

[*Continue as V. and VI., in Form 382, above.*]

## ARTICLE VIII.—LEASES. (n)

398. Lessor against lessee.....	p. 310
399. The same, for a deficiency after a re-entry by the lessor.....	310
400. Lessor against assignee of lessee.....	311
401. Lessor against the executors of the lessee.....	312
402. Grantee of reversion, against lessee.....	313
403. Assignee of rent against lessee.....	314
404. Heir of reversioner against the lessee.....	314
405. Assignee of the devisee of the reversion and rent, against an assignee of part of the premises.....	314

(m) This form is from 2 *Greenl. Ev.*,       cupation, see Form 252, &c. For actions for breaches of other covenants

413, § 376, *note*.

(n) For a complaint for use and occupation than for payment of rent, see *infra*.

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Actions upon Contracts for Payment of Money—Leases.

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398. *Lessor against Lessee.*

I. That heretofore the plaintiff, by an indenture made between him and the defendant, bearing date the            day of           , 18   , demised and leased to the defendant certain premises therein mentioned [*or very briefly designate them*], (o) at the yearly rent of            dollars.

II. That the defendant thereby covenanted to pay said rent quarterly on the first day of, &c., in each year.

III. That the plaintiff has duly performed all the conditions thereof on his part.

IV. That the defendant has not paid the rent of the [quarter] ending on the            day of           , 18   , amounting to            dollars.

399. *The Same, for a Deficiency after a Re-entry by the Lessor. (p)*

I. That heretofore the plaintiff, by an indenture made between him and the defendant, bearing date the            day of           , 18   , demised and leased to the defendant certain premises therein mentioned [*or very briefly designate them*], at the yearly rent of            dollars, payable quarterly on, &c.; and further covenanted with the plaintiff that he would not [*here state special covenant*], and that in case of any breach on his part of said covenant, the plaintiff reserved full power which was thereby acceded to by the defendant to re-enter said premises, and eject the occupants thereof, and relet the same for the benefit of the defendant.

II. That the defendant contrary to his covenant [*here state the breach*], and that the plaintiff for that cause re-entered the premises, and took possession thereof by virtue of the authority given herein in the lease, and as agent of the defendant, and not otherwise, and that he made diligent efforts to relet the premises for the defendant, but was unable to do so.

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(o) It is not necessary to set forth the premises, nor need they be designated (Dundas v. Lord Waymouth, *Cowp.*, 665; Van Rensselaer v. Bradley, 3 *Den.*, 135), except, perhaps, where there are several leases between the parties, so that the complaint would not be sufficiently certain without a designation. (p) This form is supported by Hall v. Gould, 13 *N. Y.* (3 *Kern.*), 127.



## Upon Covenants to Pay Rent.

III. That thereby the plaintiff lost the sum of                      dollars rent, which would have been payable to him on, &c.

400. *Lessor against Assignee of Lessee.* (q)

I. That on the                      day of                      , 18                      , by a lease in writing, then made between this plaintiff and one M. N., under the hand and seal of said M. N. [of which a copy is annexed as part of this complaint], (r) this plaintiff leased to said M. N. certain lands [*or very briefly designate them*], to have and to hold to said M. N. and his assigns, from the                      day of                      , 18                      , for the term of                      , then next ensuing, for the yearly rent of                      dollars, payable to this plaintiff on the [*state days of payment*], which rent said M. N. did thereby for himself and his assigns, covenant to pay to the plaintiff accordingly.

[II. That by virtue thereof, said M. N., on the                      day of                      , 18                      , entered into the demised premises, and was possessed thereof.]

III. That thereafter, and during said term, to wit, on the                      day of                      , 18                      [*naming a day before the breach*], all the estate and interest of said M. N. in said term, by an assignment then by him made, became vested in the defendant, (s) who thereupon entered into the demised premises, and became possessed thereof [and continued so possessed from thence hitherto, *or*, until, &c.] (t)

(q) This form is supported by *Holsman v. De Gray*, 6 *Abbotts' Pr.*, 79.

(r) In an action on an instrument in writing, it is often best to set forth the instrument, or those parts of it in question, or to annex a copy, and refer to it as a part of the complaint. *Fairbanks v. Bloomfield*, 2 *Duer*, 349.

(s) In this action it is not necessary to set forth the assignment specially, because it is a matter peculiarly within the defendant's knowledge. *Van Rensselaer v. Bradley*, 3 *Den.*, 135; *Norton v. Vultee*, 1 *Hall*, 384.

Where the plaintiff seeks to recover against the assignees of the term, and is ignorant whether they hold jointly or severally, and if severally, in what

proportion, he may allege the facts accordingly, and pray judgment against them jointly, if it should turn out they were jointly liable, or severally for their proper portions, if their liability should prove to be several. *Van Rensselaer v. Layman*, 10 *How. Pr.*, 505

As to liability of one who has acquired possession without a valid assignment, see *Carter v. Hammett*, 12 *Barb.*, 253; *Ryerss v. Farwell*, 9 *Id.*, 615.

(t) The assignee is liable upon the covenants of the lease only for the rent becoming due during the time in which he or his tenants have possession of the premises. *Astor v. L'Amoreaux*, 4 *Sandf.*, 524. But the clause in brack-

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Actions upon Contracts for Payment of Money—Leases.

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IV. That during the time the defendant was so possessed of the premises, to wit, on the       day of       , 18       , the sum of       dollars of said rent, for the quarter ending on that day [*or otherwise*], became due to the plaintiff from the defendant; but no part thereof has been paid. (*u*)

401. *Lessor against the Executors of the Lessee.* (*v*)

I. That on the       day of       , 18       , by a lease in writing, then made between the plaintiff and one M. N., under the hand and seal of said M. N. [of which a copy is annexed as part of this complaint], the plaintiff leased to said M. N. certain lands [*or very briefly designate them*], to have and to hold to said M. N. and his executors, administrators, and assigns, from the       day of       , 18       , for the term of       , then next ensuing, for the yearly rent of       dollars, payable to this plaintiff on the [*state days of payment*], which rent said M. N. did thereby for himself and his executors, administrators, and assigns, covenant to pay to the plaintiff accordingly.

II. [That by virtue thereof, said M. N., on the       day of       , 18       , entered into the demised premises, and was possessed thereof.]

III. That thereafter and during said term, said M. N. died, to wit, on the       day of       , 18       , leaving a will appointing the defendants his executors.

IV. That the defendants, by an order or determination of the surrogate of the county of       , duly made on the day of       , 18       , were appointed, and now are, the executors of his said will.

V. That as such executors the defendant took possession of, and occupied the premises under said lease.

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ets is not essential; for in the absence of any allegation to the contrary, the presumption is that the possession continued. *Van Rensselaer v. Bonesteel*, 24 *Barb.*, 365.

(*u*) It is sufficient to show that rent which accrued subsequent to the assignment, and during the assignee's possession is unpaid; and it is unneces-

sary to aver, in addition, that the lessee has not paid it. *Dubois v. Van Orden*, 6 *Johns.*, 105; *Van Rensselaer v. Bradley*, 3 *Den.*, 135. But it is enough to aver that he has not paid it. *Holsman v. De Gray*, 6 *Abbotts' Pr.*, 79.

(*v*) This form is supported by *Pugsley v. Aikin*, 11 *N. Y.* (1 *Kern.*), 494; reversing *S. C.*, 14 *Barb.*, 114.

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Upon Covenants to Pay Rent.

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VI. That the sum of            dollars of said rent for the quarter ending on [*a day before the lessee's death*], became due on said day to the plaintiff from said M. N., but no part thereof has been paid.

VII. For a further breach the plaintiff alleges that after the death of said M. N., and while the defendants were so in possession, the sum of            dollars of said rent for the quarter ending on, &c., on that day became due to the plaintiff from the defendants, but no part thereof has been paid. (*w*)

402. *Grantee of Reversion, against Lessee.*

I. That one M. N., being the owner in fee of certain premises [*or very briefly designate them*], did, on the            day of            , 18    , by a lease in writing then made between him and the defendant, under the hand and seal of the defendant [*a copy of which is annexed as part of this complaint*], lease to the defendant said premises from the            day of            , 18    , for the term of            , then next ensuing, for the yearly rent of            dollars, payable to said M. N., his heirs and assigns, on the [*state days of payment*], which rent the defendant did thereby covenant to pay to said M. N., his heirs and assigns, accordingly.

[II. That by virtue thereof, the defendant entered into the demised premises, and was possessed thereof.]

III. That thereafter, and on the            day of            , 18    , said M. N., by his deed, under his hand and seal [*a copy of which is hereto annexed*], sold and conveyed to this plaintiff the demised premises [*of which the defendant had due notice*]. (*x*)

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(*w*) Demands for rent which accrued in the lifetime of a decedent, and for rent accruing after his decease, while the tenancy was continued by the executors on account of the estate, are properly joined as one cause of action in a suit against the executors as such. *Pugsley v. Aikin*, 11 *N. Y.* (1 *Kern.*), 494; reversing *S. C.*, 14 *Barb.*, 114.

One who is both executor and devisee of the lessor may join a claim for rent subsequent to the decease of tes-

tator, with a claim for damages for breach of covenant respecting personal property embraced in the lease. The testator might have brought one action; and the plaintiff has a common interest as executrix and devisee. *Armstrong v. Hall*, 17 *How. Pr.*, 76.

(*x*) The declaration should show the assignments or conveyances by which the plaintiff claims title; and if there are several, they should all be stated. See *Beardsley v. Knight*, 4 *Vermont*, 471.

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Actions upon Contracts for Payment of Money—Leases.

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IV. That thereafter, to wit, on the            day of            , 18    , the sum of            dollars of said rent, for the quarter ending on that day [*or otherwise*], became due to the plaintiff from the defendant; but no part thereof has been paid.

403. *Assignee of Rent against Lessee.*

[I. and II., as in preceding form.] (y)

III. That thereafter, and on the            day of            , 18    , said M. N. duly assigned to the plaintiff said covenant and all his right to the rent therein secured

IV. [*As in the preceding form.*]

404. *Heir of Reversioner against Lessee.* (z)

I. That one M. N., now deceased, being in his lifetime the owner in fee of the tenements hereinafter mentioned, on [*&c., state the lease, and the covenants which were broken, as in the preceding forms*].

II. That the said M. N., being seized of the reversion in said demised premises, afterwards, and during the said term, on [*&c.*], died so seized; whereupon the said reversion then descended to the plaintiff as his [son and only child and] heir; and thereby the plaintiff then became seized thereof in fee.

III. That thereafter, to wit, on, &c., the sum of            dollars of said rent, for the quarter ending on that day [*or otherwise*], became due to the plaintiff from the defendant; but no part thereof has been paid.

405. *Assignee of the Devisee of the Reversion and Rent, against an Assignee of Part of the Premises.* (a)

I. That one M. N., being the owner in fee of certain premises [*or very briefly designate them*], on the            day of            , 18    , by lease in writing then made between him and one O. P., under the hand and seal of said O. P. [a copy of which is

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(y) The assignee of rent, suing in his own name, should allege distinctly, that there was a lease, that the defendant was lessee, and is sued for the rent. *Willard v. Tillman*, 2 *Hill*, 274.

(z) This form is taken from *Swan's Pl.*, 395.

(a) This form is supported by *Van Rensselaer v. Bonesteel*, 24 *Barb.*, 365.

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Upon a Note Payable on Contingency.

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annexed as part of this complaint], leased to said O. P. said premises from the            day of           , 18   , for the term of           , then next ensuing, for the yearly rent of            dollars, payable to said M. N., his heirs and assigns, on the [*state days of payment*], which rent O. P. did thereby covenant to pay to said M. N., his heirs and assigns, accordingly.

II. That by virtue thereof the defendant entered into the demised premises, and was possessed thereof.

III. That thereafter, and during said term, to wit, on the            day of           , 18    [*naming a day before the breach*], said O. P. duly assigned all his interest in a divided part of the land, equal in value to the residue of the demised premises, and thereby the defendant became tenant of such part.

IV. That on the            day of           , 18   , said M. N. died, having by his last will and testament devised the [reversion and] rent to one Q. R., which said will was duly proved and recorded as a will of real estate before the surrogate of the county of           , on, &c.

V. That Q. R., on the            day of           , 18   , duly [conveyed and] assigned said [reversion and] rent to the plaintiff.

VI. That thereafter, to wit, on the            day of           , 18   , the sum of            dollars of said rent, for the quarter ending on that day [*or otherwise*], became due to the plaintiff from the defendant; but no part thereof has been paid.

ARTICLE IX.—NOTES NOT NEGOTIABLE.

406. On a note payable in case the profits of the maker's business exceed a certain sum ..... p. 315  
 407. On a note payable in chattels ..... 316

406. *On a Note Payable in Case the Profits of the Maker's Business Exceed a Certain Sum.*

I. That on the            day of           , 18   , at           , the defendant [for value received, or, in consideration of, &c.] (b) made

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(b) If the agreement as set out admits common law sufficient to state that receipt of the consideration, a separate the note was given for value received. averment of the payment of the consideration is unnecessary. *Ward v. Jackson v. Alexander, 3 Johns., 484. Sackrider, 3 Cal., 263.* But if plaintiff undertook to set forth the consideration specially, he was

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 Actions on Contracts for Payment of Money—Notes.
 

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and delivered to the plaintiff (c) his promissory note in writing, of which the following is a copy :

\$100

Brooklyn, 1st January, 1856.

For value received, I promise to pay to A. B. one year after date, one hundred dollars, in case the proceeds of the milk-route I have this day bought of him shall exceed the sum of two thousand dollars. (Signed) Y. Z.

II. That the proceeds of said milk-route did, before the expiration of said year, exceed the sum of two thousand dollars [of which the defendant, on the       day of       , 18       , at       , had due notice, and payment of said note was then and there duly demanded]. (d)

III. That no part of said note has been paid [except, &c.]; and there is now due to this plaintiff thereon, from the defendant, the sum of       dollars, with interest from, &c.

#### 407. On a Note Payable in Chattels.

I. That on the       day of       , 18       , at       , the defendant, for value received [*or, when the consideration is described in the note, for a valuable consideration therein expressed, or, where no consideration is mentioned, for and in consideration of, &c., stating the real consideration, whatever it may have been*], made and delivered to the plaintiff his promissory note in writing, of which the following is a copy :

“For value received, I promise to pay Martin Gilbert three

bound to prove it as laid. *Jerome v. Whitney*, 7 *Id.*, 321. If the instrument set forth does not express or import a consideration, the consideration must be averred. *Spear v. Downing*, 34 *Barb.*, 522; *S. C.*, 12 *Abbotts' Pr.*, 437; *Lansing v. McKillip*, 3 *Cal.*, 286. If it specifies a consideration, and states that such consideration had not been received, and also states, or clearly implies, that the consideration is to be transferred when the money is to be paid, the complaint must allege that the plaintiff has transferred or tendered the consideration. This is matter of substance and not of form, and the

burden of proof is on him to allege and show it. *Considerant v. Brisbane*, 14 *How. Pr.*, 487.

(c) If the plaintiff claims as assignee, substitute “to M. N., the payee therein named,” in place of the words, “the plaintiff,” and add an allegation of assignment to the plaintiff. Averring an indorsement to him is not appropriate. *Brown v. Richardson*, 20 *N. Y.*, 472.

(d) If the contingency upon which the payment was to depend is one which is not peculiarly within the defendant's knowledge, this averment, or its substance, should be inserted.

## On Subscription Papers.

hundred and sixty-two dollars and fifty cents in castings, (e) such as said Gilbert shall select and direct, such as are cast at the Middleburgh furnace, which I agree to deliver at Gilbert's dwelling-house at Ghent, in Columbia county, at  $4\frac{1}{2}$  cents per pound, to be delivered within or by the first day of March next, and agree to deliver some castings, as it may be convenient for me to deliver, soon; said Gilbert to give timely notice what castings he will select or want; and in default thereof, I agree to pay the money for such part as is not paid in castings.

June 8th, 1843. (Signed) THOS. P. DANFORTH.

II. That the plaintiff thereafter duly performed all the conditions of the same on his part. (f)

III. That no part thereof has been paid (g) [except, &c.]

## ARTICLE X.—SUBSCRIPTION-PAPERS. (h)

408. By a corporation, on a stock subscription.....	p. 318
409. The same, a shorter form .....	321
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(e) Upon such a note the measure of damages in this State is the sum of money named, not the value of the goods. *Pinney v. Gleason*, 5 *Wend.*, 393; *Rockwell v. Rockwell*, 4 *Hill*, 164; and see *Gilbert v. Danforth*, 6 *N. Y. (2 Seld.)*, 585.

(f) A note payable in specific articles, without specifying time or place, is payable on demand, and a special demand is necessary. *Lobdell v. Hopkins*, 5 *Cow.*, 516; but see *Barns v. Graham*, 4 *Id.*, 452.

If the maker deals in the chattels in which payment is to be made, his place of business is the proper place to make demand. And a demand may be made there of any person in charge, in the absence of defendant. It is otherwise of ordinary contracts for delivery of goods, specifying no place. *Vance v. Bloomer*, 20 *Wend.*, 196; *Rice v. Churchill*, 2 *Den.*, 145. That he is not bound to demand all at once, see *Vance v. Bloomer*, 20 *Wend.*, 196.

On a note payable in goods, at or before a day named, no demand need be averred. A demand is only necessary if the holder would exercise an election as to the articles. *Johnson v. Seymour*, 19 *Ind. (Kerr)*, 24.

The indorsement of a note not negotiable, is equivalent to the making of a new note, and the indorser in such a case has no right to insist upon a previous demand on the maker. *Seymour v. Van Slyck*, 8 *Wend.*, 403; affirmed, *sub nom. Stone v. Seymour*, 15 *Id.*, 9.

(g) In declaring on a note for a sum of money payable in specific articles, it is enough to allege non-payment of the money, without alleging non-delivery of the articles. *Rockwell v. Rockwell*, 4 *Hill*, 164.

(h) For complaints in actions by a Mutual Insurance Company, or its receiver, to recover assessments upon premium notes, see Forms 300 and 319, *supra*.

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Actions on Contracts for Payment of Money—Subscriptions.

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408. *By a Corporation, on a Stock Subscription.* (i)

I. That in pursuance of an act of the Legislature of the State of New York, entitled "An Act to provide for the incorporation of companies to construct plank-roads and for companies to construct turnpike-roads," passed May 4, 1847, and of the acts amendatory of the same, the above-named company (j) was duly organized and formed into a corporation under the name of the Poughkeepsie and Salt Point Plank-road Company. (k)

II. That on the                      day of                      , 18                      , at                      , the said

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(i) This is the form of complaint employed in the case of Poughkeepsie, &c., Plank-road Co. v. Griffin (21 *Barb.*, 454; S. C., 15 *N. Y.*, 583), with slight formal alterations.

(j) Where the statute requires subscription before organization, the action may be brought in the name of the corporation, although the subscription was made before there was any corporate existence. Where the subscription-paper was payable "to the trustees or a building committee" of a religious corporation, it was held that the action should be brought in the name of the corporation. *Barnes v. Perine*, 9 *Barb.*, 202.

(k) As to general rule respecting the necessity of averring, in the declaration in a suit by a corporation, the corporate character of the plaintiffs, see Forms 181-183, *ante*, p. 135. In *Oswego & Syracuse Plank-road Co. v. Rust* (5 *How. Pr.*, 390), there was a demurrer to a complaint for subscriptions to the stock of a company about to be formed, and one ground of demurrer was that the complaint (which averred in general terms that the plaintiffs were an incorporated company, organized pursuant to the general act) did not show that the company had any legal existence. It was held that this averment was sufficient for any purpose; but that in that particular case no averment of plaintiffs' corporate character was necessary, for the reason

that the defendant, by subscribing for the stock, had admitted the legal existence of the plaintiffs as a corporation, and could not question their capacity to appear upon the record. This principle was laid down solely on the authority of *Dutchess Cotton Manufactory v. Davis* (14 *Johns.*, 238), from the opinion in which it is substantially a quotation. As to this point, however, the authority of the latter case is somewhat shaken by the criticism upon it in *Welland Canal Co. v. Hathaway*, 8 *Wend.*, 480. And the argument, that the defendant having contracted with a corporation by its corporate name ought to be considered estopped from denying the incorporation in a suit upon the contract, however sound in respect to contracts entered into with an existent corporation, can have no just application to an anticipatory subscription to the stock of a company; where the very notion of the contract is predicated on the fact that the company is not yet incorporated, and where the consideration itself of the contract involves a future incorporating of the proposed association. See, also, *First Baptist Society v. Rapalee* (16 *Wend.*, 605), where defendant, a subscriber before incorporation to "The First Baptist Society," was held not estopped to deny the incorporation of the plaintiffs, who sued under the corporate name of "The Trustees of the First Baptist Church."



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 On Subscriptions for Stock in Corporations.
 

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defendant and certain other persons, being desirous of associating themselves together for the purpose of constructing a plank-road from the village (now city) of P. to the village of S. P., in said county, and in consideration thereof, and of the mutual promises each to the other, and of the benefits to be derived from being members of said association, made and subscribed a certain agreement in writing, as follows, to wit:

[*Copy of subscription paper, with defendants' names, and adding*], and other persons whose names are here omitted.

III. That the said defendant did, at the time of subscribing said agreement, set opposite to his name thereto subscribed the number of ten shares, and that the amount of each share is fifty dollars, and that said defendant promised and agreed to take and pay for the same.

IV. That although notice was given in at least one newspaper printed in Dutchess county, of the time and places where books for such subscription to the stock of said road would be opened, and although after such stock to the amount of at least five hundred dollars for every mile of the road so intended to be built had been in good faith subscribed, (*l*) and five per cent. on the amount had been paid in to the persons named in the articles of association as directors, and the subscribers had, upon due notice, elected directors for said company, and had thereupon severally subscribed articles of association, which had been duly filed in the office of the Secretary of State of the State of New York: and although these plaintiffs, relying upon the said subscription of the said defendant and of other persons, did expend large sums of money in the construction of said road, and entered into contracts and personal liabilities to a large amount, to wit, the sum of        dollars, (*m*) and although the directors of said company did, on the

(*l*) Where a given amount of capital stock is required to be subscribed before a corporation, by the terms of its charter, is authorized to go into operation, it is necessary, in an action by the company against a stockholder, to recover the amount subscribed by him, that the petition should allege that the requisite amount of stock had been subscribed before he was called upon for

the amount of his subscription. *Fry v. Lexington, &c., R. R. Co., 2 Met (Ky.), 314.*

(*m*) In an action upon a railroad subscription contract, conditioned to be paid in instalments, as might, from time to time, be called for by the directors, provided the same should be expended upon a certain line of road, to be thereafter located by the company,

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Actions on Contracts for Payment of Money—Subscriptions.

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day of \_\_\_\_\_, 18\_\_\_\_, make a call (*n*) for said stock, and require the said defendant and the other stock subscribers to pay upon the capital stock by him and them subscribed, to the treasurer of said company, at their office, No. \_\_\_\_\_, &c., five dollars per hundred upon each share of stock so subscribed, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_; yet the defendant wholly neglected and refused to pay the said sum of five dollars per hundred upon each share of stock subscribed by him as aforesaid.

V. That although the directors of said company afterwards, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, made another call for stock, requiring [*continue as above*].

VI. That although the said directors afterwards, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, made a third call for stock, requiring [*continue as above*].

VII. That the defendant had due notice of the said three several calls for stock made by the directors of said company as aforesaid, and the same were duly published in at least one newspaper printed in Dutchess county, at least thirty days previous to the time specified for said payments.

VIII. That although the whole ten shares of stock subscribed by said defendant became due and payable to these plaintiffs in the sums and at the times specified in said calls; yet the defendant has not performed his agreement, and has wholly neglected and refused to pay the stock by him subscribed, or any part thereof; and is now justly indebted to these plaintiffs thereon in the sum of, &c.

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the petition must either show that the road was constructed along the line designated, or an offer or readiness to expend the money subscribed, according to the condition. *Trott v. Sarchett*, 10 *O. St.*, 241. That a general statement as to the extension would be sufficient, see *Miller v. N. Y. & Erie R. R. Co.*, 8 *Abbotts' Pr.*, 431.

(*n*) A complaint on a subscription to be paid as assessed, must aver a proper assessment. *Gebhart v. Junction R. R. Co.*, 12 *Ind.*, 484. An allegation that calls for unpaid instalments were "duly made," is a sufficient averment that they were made in conformity with the

act of assembly. *Barrington v. Pittsburgh, &c., R. R. Co.*, 34 *Penn. St. R.*, 358.

It will be usually more convenient to substitute, in place of paragraphs IV.–VII. above, the short allegation of performance authorized by section 162 of the Code, saying, That thereafter the plaintiffs, by their directors, duly made and notified calls upon said stock, requiring the defendant to pay the sum of \_\_\_\_\_ dollars, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, and the sum of \_\_\_\_\_ dollars on, &c.; and otherwise duly performed all the conditions thereof on their part

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 Upon Subscriptions for Stock in Corporations.
 

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409. *The Same, a Shorter Form. (o)*

I. [*For averment of incorporation, see the preceding form.*]

II. That in contemplation of the incorporation of these plaintiffs, and for the purpose of constructing, owning, and maintaining the        Railroad, then contemplated, the defendant [with several other persons] on the        day of       , 18       , at       , became a subscriber to the stock of the said railroad by [severally] signing and delivering an agreement in writing, of which the following is a copy: [*copy of the subscription-paper with the defendants' names, adding, and other persons whose names are here omitted*]. (*p*)

III. That among other persons the defendant signed and executed the said agreement, and set opposite to his name the sum of        dollars, (*q*) which he thereby agreed to pay to said company; and said subscription of defendant was, immediately after the organization of said company, duly transferred to the regular books of the company.

IV. That after the defendant had thus subscribed, and on or about the        day of       , 18       , he subscribed to the articles of association of said company, his name and his place of residence, to wit,       , and the number of shares of stock taken by him, to wit,        shares, amounting to        dollars, the shares of stock being        dollars each.

V. That the plaintiffs by their directors, on the        day of       , at       , required the defendant to pay thereon the

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(*o*) This form is supported by *Oswego & Syracuse Plank-road Co. v. Rust* (5 *How. Pr.*, 390), where it was held that a complaint alleging generally the incorporation of the plaintiffs pursuant to a statute referred to, "and that in contemplation of the organization of the company, to wit, on the, &c., upon due notice, subscription books were opened, as required by law, and the defendants subscribed to the capital stock of the company twenty shares, amounting to, &c., and thereby agreed to take twenty shares of the stock, and promised to pay the same to," &c., is good on demurrer; for it contains allegations of

every fact essential to be proved to support the action; the consideration is implied in the statement of the facts.

(*p*) It is sufficient to state the legal effect without giving a copy.

(*q*) In averring a subscription and payment which a statute requires to be paid in money, it is sufficiently specific to allege that the party subscribed a sum named, and that the subscription was paid, and that the amounts paid were received by the company. *Peckham v. Smith*, 9 *How. Pr.*, 436. See, also, *Highland Turnpike Co. v. McKean*, 11 *Johns.*, 98.

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Actions on Contracts for Payment of Money—Undertakings.

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sum of \_\_\_\_\_, agreeably to said subscription and the charter and by-laws of the company.

VI. That the plaintiffs have duly performed all the conditions thereof on their part.

VII. That there is due to the plaintiffs thereon from the defendant the sum of, &c., and no part thereof has been paid.

410. *On a Subscription to the Expenses of a Public Object. (r)*

I. [*For averment of incorporation, see Form 408.*]

II. That the plaintiffs, in the month of \_\_\_\_\_, 18\_\_\_\_, were erecting a building at \_\_\_\_\_, for the purposes of [an academy].

III. That the defendants and others were desirous that the building should be completed, and requested that the plaintiffs should complete the same, and for the purpose of enabling the plaintiffs to do so, the defendants subscribed and agreed to pay the plaintiffs the sum of \_\_\_\_\_ dollars, in consideration of the premises, and of the like subscription and agreement of other persons [*or, in consideration of which the defendants were to receive from the plaintiffs \_\_\_\_\_ shares of the capital stock of the plaintiffs*].

IV. That upon the faith of said subscription, the plaintiffs proceeded with the erection of the building, and expended thereon large sums of money, and incurred large liabilities, and have completed said building, and otherwise duly performed all the conditions on their part.

V. That no part of the defendants' subscription has been paid, [except, &c.]

ARTICLE XI.—UNDERTAKINGS.

[In an action on an undertaking or statute bond, the facts authorizing the giving of it, and the compliance with its condition, need not be averred if they are recited in the instrument, and it is set forth in the pleading. The recitals are equivalent to averments. (s)]

For other cases of bonds given in proceedings, see Article III., 274-9, *ante*.]

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(r) This form is sustained by *Richmondville Union Seminary, &c. v. Brownell*, 37 *Barb.*, 535; *Wayne & Ontario Collegiate Institute v. Smith*, 36 *Id.*, 576.

(s) In an action by the assignee of an undertaking given in proceedings of claim and delivery, for the payment of such judgment as might be recovered, it is sufficient, by way of

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Upon Undertakings given in Actions.

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411. Short form, where the undertaking recites the facts.....p.	323
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411. *Short Form, where the Undertaking Recites the Facts. (t)*

I. That on the       day of       , 18       , at       , the defendant made an undertaking, a copy of which is hereto annexed, as a part of this complaint.

II. That thereafter at       , judgment was recovered in the action therein mentioned [which was duly given by, &c.], against the plaintiff [or, defendant] therein, for the sum of [or otherwise according to the case], no part whereof has been paid.

III. [Where execution is necessary, it may be alleged thus:] That on the       day of       [a transcript of said judgment was duly filed in the office of the clerk of the county of       ; and on the same day], an execution thereon against the property of       was duly issued to the sheriff of said county, which has been duly returned wholly unsatisfied [or, unsatisfied as to the sum of, &c.]

IV. [If demand is necessary by the terms of the undertaking, aver it as in the following forms.]

showing the plaintiff's title, to allege that the undertaking was duly assigned, &c., to him, without alleging that the judgment in the action was also assigned. *Slack v. Heath*, 1 *Abbotts' Pr.*, 331; *S. C.*, 4 *E. D. Smith*, 95; *Morange v. Mudge*, 6 *Abbotts' Pr.*, 243.

In an action brought upon an undertaking given upon a requisition in an action of claim and delivery, by assignees of only a portion of the original promisees, there is a defect of parties.

All the promisees should be represented. But the objection to such defect is taken too late if raised for the first time on appeal. *Bowdoin v. Colman*, 6 *Duer*, 182; *S. C.*, 3 *Abbotts' Pr.*, 431.

(t) This form is supported by *Morange v. Mudge*, 6 *Abbotts' Pr.*, 243. The liability is several as well as joint, unless expressed to be only joint, and the plaintiff may sue one or both sureties. *Ib.*

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 Actions on Contracts for Payment of Money—Undertakings.
 

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 412. *On an Undertaking for Costs and Damages on an Attachment.*

I. That heretofore an action was commenced in this court [*or*, the            Court] by the defendant Y. Z. [*or*, by one Y. Z.], for the recovery of money against this plaintiff, wherein the said Y. Z. made application to one of the justices of the said court for a warrant of attachment against the property of this plaintiff, whereupon the defendant then and there [*or*, on the            day of           , 18   , at           ], executed and filed with the clerk of said court for the benefit of this plaintiff [*or*, and delivered to this plaintiff], pursuant to section 230 of the Code of Procedure, (*u*) a written undertaking, of which the following is a copy: [*copy of the undertaking*].

II. That pursuant to said application and undertaking, one of the justices of said court issued a warrant of attachment directed to the sheriff of the county of           , whereby the said sheriff was required to attach and safely keep sufficient property of this plaintiff to satisfy the demand of the said Y. Z. in said action, to wit, the sum of            dollars, together with costs and expenses.

III. That at the time of the issuing of said attachment, this plaintiff was engaged as a merchant in selling dry-goods at wholesale and retail, at No.            street, in the city of           , in said county. That the sheriff of said county, pursuant to said warrant of attachment, entered said store and removed the property of this plaintiff, and kept this plaintiff out of possession of the same for the space of over            months; that thereby the business of the plaintiff was utterly broken up, and the goods of the plaintiff became unmarketable and useless, and this plaintiff's credit was greatly injured, to his damage            dollars.

IV. That such proceedings were had in the suit aforesaid, that this plaintiff on the            day of           , 18   , recovered judgment therein, which was duly given by said court against

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(*u*) It is unnecessary to recite or refer to a public statute of which the court are bound to take notice. *Goelet v. Cowdray*, 1 *Duer*, 132; *Shaw v. Tobias*, 3 *N. Y. (3 Comst.)*, 188; but see note (*a*), *infra*.

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On Undertaking given on Discharge of Attachment.

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the said Y. Z., plaintiff therein, for the sum of        dollars, his costs of defending said action, which has not been paid.

V. That on the        day of       , 18   , at       , this plaintiff duly demanded payment of the said judgment from said Y. Z.; but no part thereof has been paid.

413. *On an Undertaking given to Obtain Discharge of an Attachment. (v)*

I. That on or about the        day of       , 18   , an attachment against the property of M. N. was issued out of the Supreme Court, by an order duly made by Hon.        in an action commenced by A. B., the plaintiff herein, against one M. N., to recover [*here briefly designate the cause of action,—e. g., first, the proceeds of the sale of certain goods, laces, and embroideries of said plaintiff; second, for money lent by said plaintiff to said M. N. on his own request; and, third, for money due by said M. N. to said plaintiff*]. (w)

II. That afterwards, and on or about the        day of       , 18   , the said M. N. having appeared in said action, and being about to apply for a discharge of said attachment, the defendants herein, W. X. and Y. Z., pursuant to section 241 of the Code of Procedure, undertook in writing in the sum of        dollars, that they would, on demand, pay to this plaintiff, the amount of the judgment which might be recovered against said M. N., not exceeding said last-mentioned amount [*or, the defendants herein executed and filed with the clerk of said court a written undertaking, pursuant to section 241 of the Code of Procedure, of which a copy is annexed as a part of this complaint, and marked Exhibit A.*]

III. That said attachment was thereupon discharged, and that subsequently, and on the        day of       , 18   , said plaintiff recovered a judgment which was duly given by said court against said M. N. in said action, for        dollars, dam-

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(v) This form is supported by *Cruyt v. Phillips*, 7 *Abbotts' Pr.*.. 205.

(w) If it be shown that the action in which the attachment was issued was brought and pending in a court of general jurisdiction, it is not necessary

to allege in the complaint that the attachment was duly issued, nor to show that the officer or court had jurisdiction to issue it. *Cruyt v. Phillips*, 7 *Abbotts' Pr.*.. 205.

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Actions on Contracts for Payment of Money—Undertakings.

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ages and costs, as appears by the record and docket thereof, duly entered and docketed on the            day of           , 18   , in the office of the clerk of            county, which judgment has not been paid.

IV. That a demand of payment thereof to the plaintiff was duly made on said defendants, on or about the            day of           , 18   , which they and each of them refused; and that no part thereof has been paid.

414. *On an Undertaking for Costs and Damages on an Arrest.*

I. That heretofore an action was commenced in the Court by the defendant Y. Z. [*or*, by one Y. Z.] against this plaintiff, wherein the said Y. Z. made application to one of the justices of said court for an order of arrest against this plaintiff, whereupon the defendants then and there [*or*, on the            day of           , 18   , at           ], executed and filed with the clerk of said court, for the benefit of this plaintiff [*or*, and delivered to this plaintiff], pursuant to section 182 of the Code of Procedure, a written undertaking, of which the following is a copy: [*copy of the undertaking*].

II. That thereupon, pursuant to said application and undertaking, an order was made by one of the justices of said court for the arrest of this plaintiff, and thereby the said Y. Z. required the sheriff of            county to arrest this plaintiff, and hold him to bail in the sum of            dollars.

III. That this plaintiff was, on or about the            day of           , 18   , arrested by the sheriff of the           , under said order, and was unjustly detained and deprived of his liberty thereunder for the space of            days, to his damage            dollars.

IV. That such proceedings were afterwards had in said action, that this plaintiff on the            day of           , 18   , recovered judgment therein, which was duly given by said court against the defendant, Y. Z., for            dollars, this plaintiff's costs and expenses of defending said action, which has not been paid.

V. That on the            day of           , 18   , at           , this



## On Undertaking of Bail.

plaintiff duly demanded payment of said judgment and damages, from the defendant, Y. Z. ; but no part thereof has been paid.

415. *On an Undertaking of Bail. (x)*

I. That on the       day of       , 18       , at       , under an order of arrest theretofore duly granted by K. L., a judge of the       Court, against one M. N., in an action brought in said court by this plaintiff against the said M. N. ; the said M. N. was arrested by the sheriff of the county of O.

II. That on the       day of       , 18       , at       , the defendants, as the bail of said M. N., executed a written undertaking, pursuant to section 187 of the Code of Procedure, of which a copy is annexed as a part of this complaint [*or*, and thereby undertook, in the sum of       dollars], that the said M. N. should at all times render himself amenable to the process of the court, during the pendency of the said action, and to such as might be issued to enforce the judgment therein [*or otherwise, according to the terms of the undertaking*].

III. That thereupon the said M. N. was discharged from said arrest.

IV. That on the       day of       , 18       , judgment in said action was duly given by said court, against him, and for the plaintiff, for       dollars, which has not been paid.

V. That on the       day of       , 18       , execution thereon

(x) The complaint in an action upon a bond given to obtain a discharge from arrest on attachment for contempt must state plaintiff's connection with the attachment proceedings, and how and to what extent he was aggrieved by the acts of the defendant. The order of the court for the prosecution of the bond operates only as an assignment. *Rayner v. Clark*, 7 *Barb.*, 581.

In an action against a judgment-debtor and his sureties upon an undertaking given to the sheriff for the appearance of such debtor upon the return of an attachment for contempt issued in supplementary proceedings, it is not necessary to allege in the complaint

the issuing and return of an execution unsatisfied, nor that an order had been made for the attachment. The averment of the recovery of the judgment, and that such proceedings were thereupon had, supplementary to execution, that the court issued the attachment under which the instrument sued upon was executed, is sufficient. *Kelly v. McCormick*, 2 *E. D. Smith*, 503.

In declaring on a bond given by an officer to be relieved from arrest on an attachment conditioned to appear at the return-day, and abide the order of the court, an allegation of non-appearance is sufficient. *Thomas v. Cameron*, 17 *Wend.*, 59 ; *Hart v. Seixas*, 21 *Id.*, 40

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Actions on Contracts for Payment of Money—Undertakings.

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against his property was duly issued to the sheriff of the county in which he was originally arrested, and the same was returned by such sheriff wholly unsatisfied [*or, if in part, say how.*]

VI. That an execution against his body was issued and tested [*or, dated*] on the       day of       18       , to the same sheriff, and was on the       day of       18       , by him returned, that the defendant could not be found within his county. (*y*)

416. *On an undertaking Given in Proceedings of Claim and Delivery, to Secure the Return of the Property, &c.* (*z*)

I. That heretofore this plaintiff commenced an action in the Court, against [T. C., sheriff of the city and county of New York], to recover possession of specific personal property.

II. That in the course of said action, such proceedings of claim and delivery, under section 203 of the Code of Procedure, (*a*) were had, that on the       day of       , 18       , the defendants made and delivered to the coroner [*or, usually, the sheriff*] for the use of this plaintiff, pursuant to section 211 of the Code, (*b*) their written undertaking, of which the following is a copy: [*copy of the undertaking.*]

III. That the personal property referred to in said under-

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(*y*) This form is according to 2 R. S., 382, § 31. *Gauntley v. Wheeler*, 31 *How. Pr.*, 137; The same *v.* The same, 4 *Lans.*, 491.

(*z*) This is in substance the complaint in *Slack v. Heath*, 1 *Abbott's Pr.*, 331; S. C., 4 *E. D. Smith*, 95.

This form may be easily modified for an action upon the undertaking given on behalf of the plaintiff on commencing such an action. It seems that the sheriff's approval of the undertaking is not necessary to be averred in an action on the undertaking. *Bowdoin v. Coleman*, 3 *Abbott's Pr.*, 431.

(*a*) It is never necessary to plead a public statute, nor even to refer to its title, in order to give the party the benefit of its provisions (*Goelet v. Cowdrey*, 1 *Duer*, 132); but this reference is for an entirely different purpose, viz: to identify the nature of the action

mentioned, in a brief way, and without detailing the proceedings. This is the form suggested by the Superior Court for an amendment to the complaint in *Bowdoin v. Coleman*, 3 *Abbott's Pr.*, 431.

As to whether it is essential that the complaint should show that the action in which the undertaking was given, was within the statute, compare *Bowdoin v. Coleman*, 3 *Abbott's Pr.*, 431; *Slack v. Heath*, 1 *Id.*, 331; *Rayner v. Clark*, 7 *Barb.*, 581; *Loomis v. Brown*, 16 *Id.*, 325; *Gregory v. Levy*, 12 *Id.*, 610; *Gould v. Warner*, 3 *Wend.*, 54; *Phillips v. Price*, 3 *Maule & S.*, 180; 1 *Bos. & P.*, 381, *note*; *McMillan v. Dana*, 18 *Cal.*, 329; *Coleman v. Bean*, 1 *Abb. Ct. App. Dec.*, 394.

(*b*) Or, when the action is upon the undertaking given on the part of the plaintiff, "section 209 of the Code."

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On Undertaking in Proceedings of Claim and Delivery.

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taking was returned to the said T. C., defendant in said action, pursuant to said undertaking, and to a requisition of said T. C., defendant in said action, made pursuant to section 211 of the Code, (c) and said undertaking was thereupon duly delivered to this plaintiff. (d)

IV. That such proceedings were afterwards had, that on the day of                   , 18   , this plaintiff recovered judgment, which was duly given by said court in said action against T. C., the defendant therein, that the plaintiff recover possession of said property, or the sum of                   dollars, in case a delivery could not be had. (e)

V. That no return of the property has been had, and no part of said judgment has been satisfied.

VI. [*State demand, where that is necessary, see paragraph V., of Form 414, or state execution unsatisfied, as follows:*] That this plaintiff thereafter caused execution to be issued on said judgment against T. C. the said defendant, which execution has been returned wholly unsatisfied, (f) and that no part of said sum has been paid.

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(c) As to the necessity of this averment, see opinion of WOODRUFF, J., in *Slack v. Heath*, 1 *Abbotts' Pr.*, 331 and 343. In a complaint upon a bond given by a defendant in an action, either for the delivery of property replevied, or the release of property attached, it must be averred that the property was delivered or released. This is the consideration, and must be alleged. *Palmer v. Melvin*, 6 *Cal.*, 651; *Williamson v. Blattan*, 9 *Id.*, 500. And this is so even if the undertaking was under seal. *Nickerson v. Chatterton*, 7 *Id.*, 568.

But if the undertaking recites the performance of the condition, a complaint setting forth the undertaking, need not also aver performance. *McMillan v. Dana*, 18 *Cal.*, 339.

(d) Where, in an action upon an undertaking given on the part of plaintiff in an action of claim and delivery, by an assignee of defendant, the undertaking is produced upon the trial, a de-

livery of it to the promisee pursuant to section 423 may be presumed; and the complaint is not defective in omitting to aver a delivery as required by that section. *Bowdoin v. Coleman*, 3 *Abbotts' Pr.*, 431.

(e) In an action against the sureties in a bond or undertaking given for the return of property replevied, the complaint should show a judgment in the alternative, for a return, or for payment of a specified value, and aver that neither has been had; and the recovery against the sureties can only be for the latter. *Nickerson v. Chatterton*, 7 *Cal.*, 568.

(f) It seems that where execution on the judgment has been returned unsatisfied, no demand is necessary. *Bowdoin v. Coleman*, 3 *Abbotts' Pr.*, 431. Neither demand nor execution is necessary where it is averred that the judgment is unpaid. *Slack v. Heath*, 1 *Id.*, 331; *S. C.*, 4 *E. D. Smith*, 95.

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 Actions on Contracts for Payment of Money—Undertakings.
 

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417. *On an Undertaking for Costs of Appeal. (g)*

I. That on the            day of           , 18   , judgment was duly given *(h)* at [a general term of this court, *or*, by the Court] in favor of the above-named plaintiffs, against one M. N. for the sum of            dollars; and that on the            day of           , 18   , the said M. N. appealed to the [Court of Appeals] from the said judgment.

II. That upon said appeal, the defendants duly made and filed with the clerk of said court, for the use of these plaintiffs, their written undertaking and justification therein, of which the following is a copy: [*copy undertaking*]. *(i)*

III. That by an order of the said [*appellate court*], made on the            day of           , 18   , the judgment appealed from was in all respects affirmed, *(j)* and the sum of            dollars, costs and damages on the appeal was awarded against the appellant, but that no part of the same has been paid. *(k)*

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*(g)* As to the liability of the sureties upon an undertaking for costs on appeal, given by *executors* defending an action, see *Mills v. Forbes*, 12 *How. Pr.*, 466.

*(h)* An averment that the judgment appealed from was final, or that the judge of the court from whence the appeal was taken approved the bond, is unnecessary. *Sutherland v. Phelps*, 22 *Ill.*, 91.

*(i)* Where the complaint on an undertaking given on appeal to the Court of Appeals, alleged that the party appealed, and that upon said appeal, the defendants "made and filed with the clerk of this court, for the use of the plaintiff," the undertaking in question, and that the appeal had been further prosecuted in the Court of Appeals, and the judgment appealed from there affirmed; but it did not state that the undertaking was accompanied by the affidavits of the sureties, as required by section 341 of the Code, it was held sufficient. The undertaking is not a nullity without such affidavit, and the

presumption is that the requirements of the Code were complied with. *Gibbons v. Bernhard*, 3 *Bosw.*, 635. Compare *Pevey v. Sleight*, 1 *Wend.*, 518, where it was held that the plaintiff should not be responsible for any defect in the appeal-bond, if there was one.

Section 341 provides that an undertaking upon an appeal to the Court of Appeals shall be of no effect unless acknowledged, &c. This is undoubtedly for the benefit of the respondent, and not necessary to be averred in an action against the sureties, where the complaint shows that the appeal was had.

*(j)* An order merely dismissing the appeal is not an affirmance of the judgment. *Watson v. Husson*, 1 *Duer*, 242. But it was held in *Sutherland v. Phelps* (22 *Ill.*, 91), that a declaration upon an appeal-bond is sufficient, which avers that the appeal was not prosecuted, and that the judgment appealed from was not paid, and that the judgment was affirmed; and that it need not be averred that the order dismissing the

## On Injunction Bond

418. *On an Undertaking Given on Obtaining an Injunction. (l)*

I. That on the       day of       , 18       , in an action brought by M. N. against this plaintiff, an injunction, issued out of this court [*or, the       court*] was duly served (*m*) on this plaintiff, by which this plaintiff was enjoined from [*here state briefly the effect of the injunction*].

II. That upon the issuing of the said injunction in the said action, the defendants gave an undertaking required by the court [*or, judge*], of which the following is a copy: [*copy of the undertaking*].

III. That said action so commenced against this plaintiff was prosecuted and carried on, and finally decided by the court, (*n*) and it was thereby adjudged that the said M. N. was not entitled to the said injunction.

IV. That the damages sustained by this plaintiff, by reason of the said injunction, amounted to the sum of       dollars, and interest thereon from the       day of       , which the court on that day awarded to this plaintiff. (*o*)

V. That no part thereof has been paid.

appeal was filed in the court from which it was taken.

(*k*) In an action on an undertaking given on appeal, if the undertaking does not make a demand necessary, the issue of an execution need not be averred. *Tissot v. Darling*, 9 *Cal.*, 278.

(*l*) Where an action is brought upon an injunction bond, the subject of the action being the damage sustained by the plaintiffs in consequence of the injunction, which prevented them from proceeding in their business, all the obligees may join as plaintiffs, notwithstanding the claim of one of them is different in its character and amount from that of the others. *Loomis v. Brown*, 16 *Barb.*, 325.

(*m*) In an action upon an undertaking given on the issue of an injunction, an allegation that the injunction was served imports a legal service, and is sufficient on demurrer. *Loomis v. Brown*, 16 *Barb.* 325.

It would be enough to say, "which this plaintiff having notice of, obeyed."

A defendant who obeys an injunction, though never served therewith, is entitled, after judgment in his favor, to claim the damages provided for in the undertaking given to procure such injunction. *Cumberland Coal & Iron Co. v. Hoffman Steam Coal Co.*, 15 *Abbotts' Pr.*, 78.

(*n*) In an action upon an undertaking entered into on granting an injunction, it is a sufficient statement of the nature of a suit, the manner of its commencement, place of trial, jurisdiction of the court, &c., to say that an injunction in the suit was granted by a justice of a court, and that issues were joined in the suit, and a judgment rendered therein. *Loomis v. Brown*, 16 *Barb.*, 325.

(*o*) A complaint in an undertaking to pay all damages which should be awarded by virtue of the issuing of an

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 Actions upon Judgments.
 

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## SECTION XIII.

## COMPLAINTS IN ACTIONS ON JUDGMENTS. (a)

[An action cannot be brought on a judgment of this State, except on justices' judgments in certain cases, until after five years from its rendition, unless leave of court is first obtained. (b) But leave, when necessary, need not be alleged in pleading. (c)

In pleading a judgment, or other determination of a court or officer of special jurisdiction, it is not necessary to state the facts conferring jurisdiction, but such judgment or determination may be stated to have been duly given or made. If such allegation be controverted, the party pleading must establish on the trial the facts conferring jurisdiction. (d)

In the case of foreign judgments, facts showing jurisdiction of the person must be alleged; and if the tribunal is one that cannot be presumed to have a general jurisdiction, it must be alleged that it has such jurisdiction, or a statute giving it special jurisdiction must be pleaded.]

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injunction, the complaint must allege an award of such damages. *Tarpey v. Shillenberger*, 10 *Cal.*, 390.

(a) For requisites of a complaint on an assessment for local improvements made by a private corporation, see *West v. Bullsken Prairie Ditching Co.*, 19 *Ind.* (*Kerr*), 458. For the allegations of a complaint to recover on an award of fence-viewers, see *Hewitt v. Watkins*, 11 *Barb.*, 409.

(b) *Code of Pro.*, § 71, and see *ante*, 48. This provision does not require a *bona-fide* assignee to obtain leave to sue. *Tufts v. Braisted*, 1 *Abbotts' Pr.*, 83; *S. C.*, 4 *Duer*, 607; *McButt v. Hirsch*, 4 *Abbotts' Pr.*, 441.

(c) *Finch v. Carpenter*, 5 *Abbotts' Pr.*, 225.

(d) *Code of Pro.*, § 161. It is held in Ohio that this provision (§ 120 of the Ohio Code) does not apply to foreign judgments. *Memphis Medical College*

*v. Newton*, 2 *Handy*, 163; and the same opinion has been intimated here. *Hollister v. Hollister*, 10 *How. Pr.*, 532; *McLaughlin v. Nichols*, 13 *Abbotts' Pr.*, 244.

It may be observed that section 163, which provides in equally general terms, that "in pleading a private statute or a right derived therefrom, it shall be sufficient to refer to such statute by its title and the day of its passage," &c., has not been understood as applying to the statutes of foreign States, it being held that even the public statutes of foreign States must be set forth. *Throop v. Hatch*, 3 *Abbotts' Pr.*, 23; *Pomeroy v. Ainsworth*, 22 *Barb.*, 118.

In Indiana, however, it is held that a complaint on a judgment of a sister State may be in this short form, alleging it to have been duly given. *Crake v. Crake*, 18 *Ind.* (*Kerr*), 156.

## On Judgments.

419. *General Form. (e)*

I. That on the                      day of                      , 18                      , at                      , in the court of                      [or, before M. N., (f) a justice of the peace in and for the town of, &c.], the plaintiff recovered a judgment, which was duly given (g) by said court [or, justice] against the defendant, for                      dollars, in an action wherein this plaintiff was plaintiff [or, defendant], and the defendant herein was defendant [or, plaintiff]. (h)

II. That no part thereof has been paid (i) [except, &c.]

420. *The Same, by an Assignee. (j)*

I. That on the                      day of                      , at                      , in the Court of                      [or, before M. N., a justice of the peace in and for the town of, &c.], one O. P. recovered a judgment which was duly

(e) This form is sufficient in an action on the judgment of any domestic court. It is equally so on a judgment of a Circuit Court of the United States, for jurisdiction is intended of them. *Bement v. Wisner*, 1 *Code R., N. S.*, 143; *Griswold v. Sedgwick*, 1 *Wend.*, 126.

(f) Under section 161 of the Code, it is necessary, in pleading the determination of an officer of special jurisdiction, to designate the officer; an averment that such determination was duly made is insufficient. *Carter v. Koezley*, 14 *Abbotts' Pr.*, 147.

The appropriate mode of pleading a judgment of a justice of the peace, is to allege that it was recovered "before him," not "in his court." *McCarthy v. Noble*, 5 *N. Y. Leg. Obs.*, 380.

(g) This form of allegation, "recovered judgment, which was duly given," is suggested by the court in *Crake v. Crake*, 18 *Ind. (Kerr)*, 156. As to how far other words may be deemed equivalent to "duly given," compare *Willis v. Havenmeyer*, 5 *Duer*, 447; *Hunt v. Dutcher*, 13 *How. Pr.*, 538.

(h) In Indiana, the record of the

judgment or a transcript must be set forth. *Brady v. Murphy*, 19 *Ind. (Kerr)*, 258; *Adkins v. Hudson*, *Id.*, 392. It should not be, in this State. *Harlow v. Hamilton*, 6 *How. Pr.*, 475. In Ohio, it is held that a transcript of a record showing the recovery of a judgment, is not "an instrument for the unconditional payment of money only," under section 122 of the Code, authorized to be made a part of the petition by reference; and that it will not be sufficient, as authorized under section 122, in cases of accounts, promissory notes, and bills of exchange, to give a copy of a transcript of a record, and state that there is due upon it a specified sum with interest. *Memphis Medical College v. Newton*, 2 *Handy*, 163.

(i) An averment that the judgment was unreversed and unsatisfied has been usual, but is unnecessary. 1 *Chit. Pl.*, 321.

(j) For a complaint by an administrator with the will annexed of a deceased judgment-creditor who was resident of a foreign State, see *Wheeler v. Dakin*, 12 *How. Pr.*, 53

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 Actions on Judgments
 

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given by said court [*or, justice*] against the defendant, for dollars, in an action wherein the said O. P. was plaintiff, and the defendant was defendant [*or otherwise as the case was*].

II. That thereafter [*or, on the*            day of            , 18    , at            ], said M. N. duly assigned (*k*) said judgment to this plaintiff [of which the defendant had due notice].

III. That no part thereof has been paid [except, &c.]

421. *On a Foreign Judgment of a Court of General Jurisdiction.*

I. That at the times hereinafter mentioned, the Circuit Court of the county of            , of the State of            , was a court of general jurisdiction, duly created by the laws of that State. (*l*)

II. That on or about the            day of            , the plaintiff commenced an action in said court [*or, if the preceding allegation is not inserted*, in the Supreme Court of the State of            ], against the defendant by the issue of summons [*or other process*], which summons was duly and personally served on the defendant [*or, in which action the defendant voluntarily and duly appeared in person, or, by attorney*]. (*m*)

III. That such proceedings were thereupon had, that on the day of            , 18    , in said action the plaintiff recovered judgment, which was duly given by said court against the defendant, for the sum of            dollars.

IV. That no part thereof has been paid [except, &c.]

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(*k*) This form of allegation is sustained by *Martin v. Kanouse*, 2 *Abbotts' Pr.*, 330. It is not necessary to aver any demand of payment by the assignee, or any refusal to pay by the debtor. *Moss v. Shannon*, 1 *Hilt.*, 175.

(*l*) This paragraph is only necessary in the case of a court whose title indicates that it may be one of limited jurisdiction. In such a case it is better to aver that the court had a general jurisdiction. This was held necessary in an action on the judgment of a county Circuit Court of another State, in *McLaughlin v. Nichols*, 13 *Abbotts' Pr.*, 244. In *Foot v. Ste-*

*vens*, however (17 *Wend.*, 483), it is said that Courts of Common Pleas and County Courts of other States are to be presumed of general jurisdiction. Compare, also, *Frees v. Ford*, 6 *N. Y.* (2 *Seld.*), 176; *Kundolf v. Thalheimer*, 17 *Barb.*, 506.

In pleading the judgment of a court of general jurisdiction of another State, if the defendant therein was served or appeared, the facts upon which jurisdiction is founded, need not be averred. Want of jurisdiction is matter of defence. *Wheeler v. Raymond*, 8 *Cow.*, 311.

(*m*) Alleging that he was personally



## On Judgments.

422. *On a Foreign Judgment of a Justice's Court, or other Inferior Tribunal.*

I. That at the times hereinafter mentioned, M. N. was a justice of the peace, in and for the town of \_\_\_\_\_, in the county of \_\_\_\_\_, and State of \_\_\_\_\_, having authority under and by virtue of an act of said State, entitled \_\_\_\_\_, passed on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, to hold court, and having jurisdiction as such over actions of [*state the jurisdiction sufficiently to make it appear that it included the cause in question*]. (n)

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, aforesaid, the plaintiff commenced an action against the defendant before the said justice, by summons [*or other process*] duly issued by said justice on that day, for the recovery of [*here designate the cause of action sufficiently to show it to be within the jurisdiction*], which summons was duly and personally served on the defendant [*or, in which action the defendant voluntarily and duly appeared*]. (o)

III. That such proceedings were thereupon had, that on the

duly notified, but not saying of what, or that he had personal notice of the commencement of the suit, without saying from whom, is bad. Long v. Long, 1 *Hill*, 597.

(n) In the case of a declaration on a foreign judgment of a subordinate tribunal of limited jurisdiction, the authority under which the judgment was rendered should be set forth. *Stiles v. Stewart*, 12 *Wend.*, 473. A general allegation that the justice had jurisdiction is not enough. The statute giving jurisdiction should be pleaded. *Sheldon v. Hopkins*, 7 *Wend.*, 435; *Stiles v. Stewart*, 12 *Id.*, 473. A judgment against the plaintiff for costs of a non-suit only, is an exception to this rule. *Turner v. Roby*, 3 *N. Y. (3 Comst.)*, 193.

The above allegation must of course be varied according to the statutes which give jurisdiction to the justice.

After stating the facts on which jurisdiction depends, it is sufficient,

without setting out the proceedings, to say "such proceedings were had," that plaintiff recovered, &c. *Turner v. Roby*, 3 *N. Y. (3 Comst.)*, 193.

In declaring upon a domestic judgment rendered by a justice in a suit commenced by long summons, it was not necessary to allege that the defendant was a resident of the county; and if it was alleged that the summons was duly issued and personally served by a constable, it was not necessary to add that it was returned to the justice; nor that the constable made a return thereon; nor that any time of day was specified in the process; nor that a court was held at the time and place specified. *Barnes v. Harris*, 4 *N. Y. (4 Comst.)*, 374; 3 *Barb.*, 603.

(o) To show that jurisdiction over the person had been acquired, it is necessary to aver, either that the party appeared, or that process was sued out and duly served on him. *Cornell v. Barnes*, 7 *Hill*, 35.

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Actions for Unliquidated Damages for Breach of Contract.

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day of           , 18   , in said action the plaintiff recovered judgment, which was duly given by said justice against the defendant, for the sum of           dollars, to wit,           dollars for said debt [*or*, damages], and           dollars costs. (*p*)

IV. That no part thereof has been paid [except, &c.]

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### SECTION XIV.

#### COMPLAINTS IN ACTIONS FOR UNLIQUIDATED DAMAGES FOR BREACHES OF CONTRACTS.

[In an action for breach of contract, the engagement which the defendant has violated should be stated, and if it was an alternative or a conditional engagement, or qualified by any exception, this should appear in the pleading. (*a*) And a sufficient consideration must be alleged, if not implied from the nature of the instrument. (*b*)

If the contract was in writing, the pleader may set forth its substance or legal effect, in his own words; (*c*) but the better course generally is to set forth a copy of it; or, if it is very long, to annex a copy, and refer to it as a part of the complaint. (*d*)

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(*p*) This should be inserted, if it would not otherwise appear that the amount of the debt did not exceed the justice's jurisdiction. See *Smith v. Mumford*, 9 *Cow.*, 26.

(*a*) *Hatch v. Adams*, 8 *Cow.*, 35; *Stone v. Knowlton*, 3 *Wend.*, 374; *Lutweller v. Linnell*, 12 *Barb.*, 512; *Roget v. Meritt*, 2 *Cal.*, 117.

(*b*) See *ante*, 216, note (*e*); *Ross v. Sagdbeer*, 21 *Wend.*, 166.

In alleging a previous contract merely by way of inducement, it is enough if the names of the parties, the amount, and the subject-matter are stated, without setting forth the instrument. *Nellis v. De Forest*, 16 *Barb.*, 61.

When a contract, whether statutory or otherwise, is the mere subject-matter of a new engagement, it is not necessary in an action to enforce such new engagement, and not for the purpose of carrying out the provisions of the original contract, to set forth in the complaint that the requisite steps were

taken to make such original contract effectual. Both parties by making it the subject of the new engagement impliedly admit its validity. *Horner v. Wood*, 15 *Barb.*, 371; *Shaw v. Tobias*, 3 *N. Y. (3 Comst.)*, 188.

(*c*) Setting forth a contract, without stating any time for performance or payment, is sufficient on demurrer, for the law imports from such a contract that the defendant should have a reasonable time within which to perform; and was entitled to payment on performance. *Fickett v. Brice*, 22 *How. Pr.*, 194. But as it might be obnoxious to a motion, it would be better, in an action on such a contract, to allege the legal effect, which would show that the ambiguity was not an omission by the pleader.

(*d*) *Fairbanks v. Bloomfield*, 2 *Duer*, 349. In Ohio it is said to be the better practice to insert the instrument in the pleading, rather than to annex and refer to it. *Swan on Pl.*, 204.

## General Principles of Pleading Contracts.

If the instrument contains provisions which are not material to the cause of action, it is better to omit such parts. Thus, in an action on one of the covenants for title in a deed of real property, the pleading need not be incumbered with a copy of the whole instrument. It is enough to allege the conveyance, describing it, and showing a consideration for the covenant, and then to set forth a copy of the covenant. (*e*)

Where a contract is alleged to have been made, averring a delivery is unnecessary in general: (*f*) and this rule applies to the case of deeds; though if the time of delivery, as distinguished from the date, is material, it is proper to aver it. (*g*)

It is not sufficient, however, to set forth barely the clause which the defendant has violated. The whole of the provision which he has violated, with any exceptions which it contains, should be set forth, or any other provisions or subsequent modifications which enlarge or restrict the operation of the provision sued on. (*h*)

If the contract made conditions precedent, they should be stated, and the plaintiff must allege performance.

In pleading the performance of conditions precedent, in a contract, it is not necessary to state the facts showing such performance; but it may be stated generally that the party duly performed all the conditions on his part; and if such allegation be controverted, the party pleading must establish on the trial the facts showing such performance.

If this short form is not adopted, each fact which is necessary to show performance must be alleged, according to the rules of the old practice. (*i*)

If there are concurrent conditions, it must appear that the plaintiff is ready and willing to perform them, (*j*) and in some cases that he tendered

(*e*) *Swan on Pl.*, 198.

(*f*) *Prindle v. Caruthers*, 15 *N. Y.*, 425; *Brinkerhoff v. Lawrence*, 2 *Sandf. Ch.*, 400. An averment that one gave a deed according to the agreement, implies that it was accepted. *Gazley v. Price*, 16 *Johns.*, 267. This rule is, however, subject to exception in the case of instruments like an assignment in trust for benefit of creditors, where a delivery and an acceptance of the trust must be averred in an action to charge the grantee. *Whitlock v. Fiske*, 3 *Edw.*, 131.

(*g*) *Tompkins v. Corwin*, 9 *Cow.*, 255. Proof that the date appearing in the deed and alleged in the pleading was not the original date, but that it had been substituted by an erasure by the consent of parties, is not a variance.

(*h*) A mere parol extension of the time of performing a sealed agreement, does not prevent plaintiff from declaring on the original contract, if it is no

part of his complaint that the work was not done in time. *Crane v. Maynard*, 12 *Wend.*, 408.

(*i*) *Hatch v. Peet*, 23 *Barb.*, 575; *Dakin v. Williams*, 11 *Wend.*, 67; *Glover v. Tuck*, 24 *Id.*, 153; *Williams v. Healey*, 3 *Den.*, 363.

(*j*) In the forms here given we have averred readiness and willingness, in addition to the general averment of performance, though we think it is the better opinion that the latter sufficiently includes the former, and renders it unnecessary.

The old rule was, that readiness, &c., might be averred generally, but that performance must be fully set forth. The Code proposed to apply the same short method to the latter class of facts. Readiness, &c., though it is properly a condition concurrent in the contract, is a condition precedent to the right to recover, and is often, in the cases designated, a condition precedent. See *Williams v. Healey*, 3 *Den.*, 363; *Crandall*

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 Actions for Unliquidated Damages for Breach of Contract.
 

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performance. (*k*) A waiver of an express condition, or an excuse for the non-performance of such a condition, should be pleaded, instead of averring performance of it. (*l*)

The facts constituting the breach complained of should be stated. (*m*)

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*v. Clarke*, 7 *Barb.*, 169; *Clarke v. Crandall*, 27 *Id.*, 73.

In England, it is settled that the general averment that the plaintiff hath always, from the time of making the agreement hitherto, well and truly performed all things on his part, is (at least upon general demurrer, or upon demurrer to plea) a sufficient averment that the plaintiff was ready and willing. *Rust v. Nottridge*, 1 *Ellis & Bl. (Q. B.)*, 99. So, also, in *Bentley v. Dawes*, 9 *Exch. (Welsb. H. & G.)*, 666, it was held that the general averment of performance of all conditions precedent, and that all things have been done and happened to entitle the plaintiff to receive, &c., is sufficient to show readiness and willingness on his part to pay.

The same rule seems to be settled in Ohio, where the general averment authorized by the Code is held to include constructive and implied conditions, such as demand, notice, readiness, or whatever is necessary to put the plaintiff in default. *Swan on Pl.*, 206; *Nathan v. Lewis*, 1 *Handy*, 242.

In this State there is no distinct authority upon the question, and the cases that bear upon it have been regarded as requiring a separate averment of readiness and willingness. Thus in *Beecher v. Conradt*, 13 *N. Y. (3 Kern.)*, 108, the complaint alleged that a party of the first part in the contract and the plaintiff had always fulfilled and kept all things therein contained on their part to be performed; but at the trial the plaintiff failed to prove his readiness to convey, and the complaint seems to have been regarded as defective in not containing an averment of such readiness; but the question of pleading does not seem to have been much con-

sidered. In *Dunham v. Pettee*, 8 *N. Y. (4 Seld.)*, 508; *Lester v. Jewett*, 11 *N. Y. (1 Kern.)*, 453; and *Smith v. Wright*, 1 *Abbotts' Pr.*, 243, there was no allegation of performance.

The allegation of readiness, &c., is therefore inserted as a separate averment, in the following forms, rather in deference to the doubt that might be raised by its omission, than because it ought to be held necessary.

(*k*) Under an agreement for the purchase of a thing at a future day named, and at a specified price, the transfer and the payment of the price are dependent acts, and the vendor cannot recover without averring and proving a tender or offer to sell and transfer at the time fixed. A count averring that he was ready and willing to sell and transfer at the time named, is bad on demurrer. *Lester v. Jewett*, 11 *N. Y. (1 Kern.)*, 453; reversing *S. C.*, 12 *Barb.*, 502; *Smith v. Wright*, 1 *Abbotts' Pr.*, 243; 5 *Sandf.*, 113. Compare *Coonley v. Anderson*, 1 *Hill*, 519.

Where the power to perform the covenant, on the part of the plaintiff, depends on acts previously to be done on the part of the defendant,—*e. g.*, plaintiff's executing a purchase-money mortgage,—it is unnecessary for the plaintiff to aver a tender and refusal, but an averment of a readiness to perform is sufficient. *West v. Emmons*, 5 *Johns.*, 179. As to what informal or indirect averments of a tender are sufficient, see *Miller v. Drake*, 1 *Cai.*, 45; *North v. Pepper*, 21 *Wend.*, 636.

(*l*) *Baldwin v. Munn*, 2 *Wend.*, 399. Otherwise, however, of a waiver of tender, which is an act *in pais*. *Holmes v. Holmes*, 9 *N. Y. (5 Seld.)*, 525; 12 *Barb.*, 137.

(*m*) *Schenck v. Naylor*, 2 *Duer*, 675.

## General Principles of Pleading Breaches.

In general, where the covenant describes a specific act, it is sufficient to aver a breach in the words of the covenant; but where it provides for a number of acts by one generic phrase, it will not be sufficient to use the words of the covenant, but the particular acts constituting the breaches must be set forth.] (*n*)

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*Van Schaick v. Winne*, 16 *Barb.*, 89. A general allegation in the complaint that certain acts alleged to have been done, were done "in violation of the defendant's agreement," is a mere averment of a conclusion of law, and is bad upon demurrer. The complaint should show facts from which it appears that the defendant has broken the covenant. *Schenck v. Naylor*, 2 *Duer*, 675.

If the pleader alleges generally that the adverse party had failed to fulfil the contract, and also sets forth a number of instances of disregard of its terms, he is not on the trial confined to the particular defaults stated, but may prove any defaults under his general allegation. If this clause was too general, the remedy was by motion. *Trimble v. Stilwell*, 4 *E. D. Smith*, 512.

(*n*) On a contract to sell goods for not less than a certain sum, and to account, a count averring that the defendant sold them for a less sum, and did not account, is good in substance. A count not averring a sale, but only a refusal to account, is bad; for until sale there is no breach. *Wolfe v. Luyster*, 1 *Hall*, 146.

Under a covenant to sell land, using diligence to do so to the best advantage, and pay over the proceeds, assigning as a breach that defendant did not sell for the best price that could be

obtained, is bad, as being uncertain whether the breach be for not selling, or for selling at other than the best price. *Brown v. Stebbins*, 4 *Hill*, 154.

The plaintiff should aver enough to show, with reasonable certainty, that he has been damaged. Thus, on an agreement to buy a farm of a specified number of acres at a specified sum per acre, but excepting a road running through it, and to bid upon it up to that amount on a judicial sale, a declaration for not bidding must state the quantity of land in the road, so as to show that plaintiff was damaged. *Gould v. Allen*, 1 *Wend.*, 182. So where the parties were engaged in a joint enterprise, each to attend to a distinct part, and they were to settle monthly and divide the moneys received; a declaration setting forth the agreement, and alleging that the defendant had received money, to a specified amount, and had not, although requested so to do by the plaintiffs, paid to them the balance remaining in his hands belonging to them, was held bad in substance, for want of an averment of a definite balance in the defendant's hands; or that he had refused to settle with the plaintiffs to ascertain the balance. *Pattison v. Blanchard*, 5 *N. Y.* (1 *Seld.*), 186.

See, also, as to assigning breaches, p. 267, *ante*.

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 Actions for Unliquidated Damages for Breach of Contract.
 

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## ARTICLE I.—COVENANTS.

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423. *On Covenant against Incumbrances on Real Property. (o)*

I. That on the            day of           , 18   , the defendant [and M., his wife], for a valuable consideration, by deed, conveyed to the plaintiff in fee simple, a farm in the town of           , county of            [*or otherwise briefly designate the property, and the estate therein conveyed.*] (*p*)

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy : [*copy of covenant, or, whereby he covenanted, &c., stating its substance, as in Form 424, to the †*].

III. That at the time of the making and delivery of said deed the premises were not free from all incumbrance, but \* on the contrary (*q*) were subject to the [inchoate] right of dower of

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(*o*) For the substance of a sufficient complaint on a bond to discharge incumbrances, see *McCarty v. Beach*, 10 *Cal.*, 461.

(*p*) Even at common law, it was sufficient in a declaration for a breach of a covenant, to state that the defendant conveyed to the plaintiff certain land or premises in the said deed particularly mentioned and specified, making

profert, without any further description. 1 *Saund.*, 233, n. 2; 2 *Ohit. Pl.*, 192, n. i; *Dunham v. Pratt*, 14 *Johns.*, 372.

(*q*) Even on covenant "to free land from all incumbrances," the assignment of breach should show an incumbrance. *Juliand v. Burgott*, 11 *Johns.*, 6; *Thomas v. Van Ness*, 4 *Wend.*, 549. Compare *People v. Russell*, *Id.*, 570.

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 Upon Covenants for Quiet Possession.
 

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one M. N., wife [*or* widow] of one O. N., the former owner of the premises.

IV. And for a further breach the plaintiff alleges, that on the       day of       , 18       , one O. P. recovered a judgment in the       Court, at       , against the defendant, for the sum of       dollars, which judgment was, on the       day of       , 18       , docketed in said county of [*the place where the premises are situated*], and which judgment, at the time of the execution and delivery of the deed, remained unpaid and unsatisfied of record. (*r*)

V. And for a further breach, the plaintiff alleges, that at the time of the execution and delivery of said deed the premises were subject to a tax theretofore duly assessed, charged, and levied upon the said premises by the said city of       , and the officers thereof, of the sum of       dollars, and which tax was then remaining due and unpaid, and was at the time of the delivery of said deed a lien and incumbrance by law upon the said premises.

VI. That by reason thereof this plaintiff was obliged to pay, (*s*) and did, on the       day of       , 18       , pay the sum of       dollars in extinguishing the right of dower [*or*, the lien of the judgment, *or*, the tax, *or all of them*] aforesaid. (*t*)

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(*r*) Allegations in a complaint that certain persons recovered judgments against the owner, which judgments were liens and incumbrances upon the said lot or parcel of land, at the time of the conveyance thereof as aforesaid, should be considered on the trial as embracing the fact of the docketing of the judgment and its legal effect; and a motion to dismiss the complaint for want of an express statement of that fact, should be denied. *Cady v. Allen*, 22 *Barb.*, 388.

So, also, before the Code, it was held that in an action on a note given for the price of land, where defendant gave notice that plaintiff, on conveying, covenanted to deduct from the note, judgments outstanding against him that should be a lien upon the land, and paid by defendant; and that there were

divers such judgments which defendant had been obliged to pay; this notice was sufficient to let in proof of any such judgment, &c., though no judgment was specified or described in the notice, for under such a covenant plaintiff could not be supposed to be surprised. *Chamberlain v. Gorham*, 20 *Johns.*, 746; reversing S. C., *Id.*, 144.

(*s*) Compulsion by suit is not necessary. *Prescott v. Trueman*, 4 *Mass.*, 627.

(*t*) If the plaintiff has not paid off or bought in the incumbrance, he can recover only nominal damages. See *Delavergne v. Norris*, 7 *Johns.*, 358; *Hall v. Dean*, 13 *Id.*, 105; *Stanard v. Eldridge*, 16 *Id.*, 254. There is an exception in the case of a covenantee who bought for the purpose of a resale, the covenantor having had notice of this

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 Actions for Breach of Contract—Covenants for Title
 

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424. *The Same, where the Conveyance was Expressed to be Subject to a Specified Incumbrance.*

I. [*As in preceding form.*]

II. That by said deed the premises conveyed were described as being subject, nevertheless, to the payment of a certain mortgage [*or other incumbrance, describing it by date, name of parties, amount, and the place of record, as in the deed*], and no other grants, titles, charges, estates, judgments, taxes, assessments, or incumbrances were mentioned or specified in said deed, as existing upon, or affecting, or incumbering said premises or the title thereto.

III. That said deed contained a covenant on the part of the defenddant, by which he, for himself, his heirs, executors, and administrators, covenanted and agreed to and with the plaintiff, his heirs and assigns, that the said premises then were free, clear, discharged, and unincumbered of and from all other and former grants, titles, charges, estates, judgments, taxes, assessments, and incumbrances of what nature or kind soever,† except as above; meaning, except the mortgage aforementioned [*or set forth a copy of the covenant, as in preceding form*].

IV. That at the time of the making and delivery of the said deed, the premises were not free from all incumbrances other than the mortgage therein excepted, but [*continue as in preceding form, from the \**].

425. *On a Covenant for Quiet Enjoyment.*

I. That on the            day of           , 18   , the defendant [and M., his wife], for a valuable consideration, by deed, conveyed to the plaintiff in fee simple, a farm in the town of           , county of            [*or otherwise briefly designate the property and the estate therein conveyed*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant,*

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intention at the time of the sale. *Bachelder v. Sturgis*, 3 *Cush.*, 201. In such case those facts, and the diminished value of the estate under the incumbrance, should be alleged. Where the

covenantee has paid off the incumbrance, the expenditure is a special damage, and should be specially averred. *De Forest v. Leete*, 16 *Johns.*, 122.



## On Covenants of Seizin and Power to Convey.

or, whereby he covenanted, &c., *stating its substance as in the preceding form, to the †*].

III. That the plaintiff has not been permitted peaceably to occupy and enjoy said premises, or to receive the rents and profits thereof; but on the contrary, on the       day of       , 18       , one M. N., who at the time of making said deed, and continually from thence, until the time of the eviction herein-after mentioned, was the lawful owner [*or, lawfully entitled to possession*] of said premises, entered into the same, and ejected and removed the plaintiff by due process of law, from the possession and occupation of the same [*or if only a part, designate what part*], with the appurtenances, and has ever since kept him out of the same. (*u*)

IV. That by reason thereof the plaintiff has not only lost said [part of the] premises, but also the sum of       dollars, by him laid out and expended in and upon the said premises in repairing and improving the same, and has also been obliged to pay the sum of       dollars costs and charges sustained by the said M. N. in prosecuting his action for the recovery thereof, and the sum of       dollars, for his own costs, charges, and counsel-fees in defending said action. (*v*)

426. On a Covenant of Seizin, or of Power to Convey. (*w*)

I. That on the       day of       , 18       , the defendant [and M., his wife], for a valuable consideration, by deed, conveyed to the plaintiff in fee simple, a farm in the town of       , county of       [*or otherwise briefly designate the property, and the estate therein, conveyed*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant*,

(*u*) In assigning breaches on the covenants of seizin, and of good right to convey, it is sufficient to negative the words of the covenant; but the covenants for quiet enjoyment, and of general warranty, require the specification of an eviction by paramount legal title. Alleging that A. having superior title at the time of the execution of the deed, entered by virtue of

due process of law, and evicted the plaintiff, is sufficient. *Rickert v. Snyder*, 9 *Wend.*, 416.

(*v*) For other allegations of special damage, see Forms 434 and 444.

(*w*) This form is supported by *Rickert v. Snyder*, 9 *Wend.*, 416; 4 *Kent's Com.*, 479.

It is enough to aver the breach in the words of the covenant.

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Actions for Breach of Contract—Covenants for Title.

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or, whereby he covenanted, &c., *stating its substance*. See Form 424].

III. That at the time of the execution and delivery of said deed, the defendant was not the true, lawful, and rightful owner [*&c., negating the words of the covenant*].

IV. And for a further breach of the said covenant, the plaintiff alleges that at said time the defendant had not in himself good right, full power [*&c., negating the words of the covenant*], whereby plaintiff has sustained damage                  dollars.

427. *On a Covenant of Warranty;—for Failure of Title.*

I. That on the                  day of                  , 18                  , the defendant [and M., his wife], for a valuable consideration, by deed, conveyed to the plaintiff in fee simple, a farm in the town of                  , county of                  [*or otherwise briefly designate the property, and the estate therein, conveyed*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant of warranty, or allege its substance*. See Form 424].

III. That the plaintiff afterwards lawfully entered upon the premises, and became seized thereof accordingly. (x)

IV. That the defendant has not warranted and defended the premises to the plaintiff; but, on the contrary, on the day of                  , 18                  , one M. N., who at the time of making said deed had, and ever since until the last-mentioned day, continued to have lawful right to the premises by an elder and better title, lawfully entered the premises, and ousted the plaintiff thereof, and still lawfully holds him out of the same, (y) to his damage                  dollars.

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(x) It is said that where the covenant is held out of possession by one in actual possession under a paramount title at the time of the grant, the covenant is broken. *Whitty v. Hightower*, 12 *Smed. & M.*, 478. In such case omit this allegation and add,—

III. That the defendant has not warranted and defended the premises to this plaintiff; but, on the contrary, at the time of the making and delivery of

said deed, one M. N. was seized and possessed of the premises, lawfully claiming the same by an elder and better title, and lawfully then held and still holds this plaintiff out of possession thereof, to his damage                  dollars.

(y) In order to sustain an action for the breach of a general covenant of warranty, an actual eviction or ouster of the plaintiff from the possession of

## On Covenant of Warranty.

[*Or, where the eviction was by recovery at law,*] IV. That the defendant has not warranted and defended the premises to the plaintiff; but, on the contrary, one M. N., lawfully claiming the same premises by an elder and better title, afterwards, in an action brought by him in the                  Court, held at                  , in which said M. N. was plaintiff, and this plaintiff was defendant [and of which action due notice was given to the said defendant in this action], (z) did, on the                  day of                  , 18                  , recover judgment, which was duly given by said court against this plaintiff for his seizin and possession of the premises, and afterwards and on the                  day of                  , 18                  [by virtue of a writ of execution duly issued thereon], lawfully entered the premises and ousted the plaintiff thereof, and still lawfully holds him out of the same, to his damage                  dollars.

423. *The Same ;—for Deficiency in Quantity.*

I. That on the                  day of                  , 18                  , the defendant [and M., his wife], for a valuable consideration, by deed conveyed to the plaintiff [in fee simple], a farm in the town of                  , county of                  , in said deed bounded and described as follows: [*copy description*].

II. That said deed contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant, or, whereby he covenanted, &c., stating its substance. See Form 424*].

III. That the said farm contained only sixty acres of land, instead of ninety acres, as described and warranted in said deed, to the plaintiff's damage                  dollars.

the whole or a part of the premises by process of law, or lawfully by paramount title, must be averred and proved. *Rickert v. Snyder*, 9 *Wend.*, 416. Averring that the plaintiff was lawfully evicted from the right and title to said premises by a paramount and lawful title to the same, does not import an ouster from possession. *Blydenburgh v. Cotheal*, 1 *Duer*, 176.

(z) If the covenantor has notice of the action, the covenantee is not bound to defend (*Jackson v. Marsh*, 5 *Wend.*, 44); and the proceedings will be conclusive against the covenantor in this action. *Cooper v. Watson*, 10 *Id.*, 202. Verbal notice is sufficient. *Miner v. Clark*, 15 *Id.*, 425; but see *Kelly v. Dutch Church of Schenectady*, 2 *Hill*, 105.

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Actions for Breach of Contract—Purchaser's Covenants.

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429. *On a Grantee's Covenant to Build.*

I. That in consideration that the plaintiff would sell and convey to the defendant a lot of land [*very briefly designating it*] for the sum of            dollars, the defendant, on or about the            day of           , 18   , undertook and promised the plaintiff [by his covenant] that he would erect upon 'the premises a good brick dwelling-house, to be occupied as such, and that he would not erect upon the premises any building that would be a nuisance to the vicinity of the premises.

II. That the plaintiff did accordingly sell and convey to the defendant said premises for said sum, but the defendant has not erected a good brick dwelling-house on the lot, to be occupied as such; but, on the contrary, has suffered it to lie open and uninclosed [*or, but, on the contrary, has erected, &c., stating what*].

III. That said lot was a part of a considerable tract of land, which the plaintiff laid out into lots and offered for sale for the purpose of the erection of dwelling-houses, requiring each purchaser to covenant to erect a dwelling-house, and that the erection of such dwelling-house on lots sold improved the residue of the lots belonging to the plaintiff, and increased their value and their market-price.

IV. That the defendant's violation of this covenant has prevented other lots in the vicinity from becoming valuable to the plaintiff, as they would otherwise have done, and has injuriously affected their condition and hindered the plaintiff from selling them; (a) to his damage            dollars.

430. *On a Covenant against Nuisances; the Covenant being in a Deed executed only by the Grantor.*

I. That on the            day of           , 18   , at           , the plaintiff, by his deed, conveyed to the defendant for a valuable consideration, as well as in consideration of the covenant herein-after mentioned, a lot of land [*very briefly designating it*].

II. That said deed contained a covenant on the part of the

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(a) In an action on such a covenant special damages must be alleged. *Bogert v. Burkhalter*, 2 *Barb.*, 525.

## On Covenant to Build Fence.

defendant, the grantee therein, of which the following is a copy :  
[*copy of the covenant against nuisances*].

III. That said deed was delivered by the plaintiff to the defendant and by him duly accepted, and he became thereby the owner of the premises, and bound by the covenant aforesaid.

IV. That the defendant has erected, or suffered or permitted to be erected, on said premises, a building occupied in a manner which is a nuisance to the vicinity of the premises, to wit, a building erected for, and used as a slaughter-house.

V. That the offal and blood in and carried out from said slaughter-house, and the offensive smell created thereby, is a nuisance to the vicinity of the said premises and to the plaintiff, whose house is adjoining; (b) to his damage        dollars.

431. *On a Continuing Covenant to Maintain a Fence. (c)*

I. That on the        day of       , 18       , the plaintiff and the defendant then being owners of lands adjoining, made an agreement in writing, under their hands and seals, and thereby the defendant covenanted to erect a fence upon the boundary line between the said lands of the plaintiff and those of the defendant, and to maintain the same and keep the same in constant repair [*or, an agreement, of which a copy is hereto annexed, as a part of this complaint*].

II. [*If there are any conditions on the part of the plaintiff they should be set forth, unless the whole agreement is annexed; and add, That the plaintiff duly performed all the conditions thereof on his part.*]

III. That the defendant did not, after the erection of said fence, maintain the same and keep it in continual repair, but, on the contrary, in the month of       , 18       , he suffered the

(b) In an action for the breach of the usual covenant against nuisances in a deed of lands, the plaintiff must show what the alleged nuisance is, and how it has injured him. *Bogert v. Burkhalter*, 2 *Barb.*, 525.

For allegations of injury to the value of adjoining property, see preceding form.

(c) Where the plaintiff has already re-

covered in a former action former damages from a breach of the same covenant, it would be proper, according to the opinion of the court in *Beckwith v. Griswold* (29 *Barb.*, 291), to allege that he had brought an action and recovered therein for former damages, and that the damages now sued for accrued since the commencement of the former action.

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Actions for Breach of Contract—Covenants in Leases.

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same to become dilapidated and broken down, and to remain in that condition from that time ever since [or, until the day of           , 18   ].

IV. That by means thereof the plaintiff suffered great damage by the injury to his lands and crops thereon, and his garden and fruit-trees, by cattle coming through said broken-down fence from the defendant's land upon his premises, and that he was compelled to repair and rebuild said fence, in order to protect his land from the cattle coming from defendant's land, (d) to his damage            dollars.

**432. *Against Tenant, for Breach of Covenant to keep Premises in Repair.***

I. That on the            day of           , 18   , by a lease in writing then made between the plaintiff and the defendant, under their hands and seals [or, under the hand and seal of the defendant], the plaintiff leased to the defendant for one year from said date, at a yearly rent of           , a certain dwelling-house, with stable and sheds attached, in the village of           , in the county of           , the property of the plaintiff, the same being upon a part of the estate of M. N., deceased [or otherwise briefly designate the premises].

II. That said lease contained a covenant on the part of the defendant, of which the following is a copy: (e) [*copy of the covenant*]. (f)

[Or, II. That the defendant in said lease covenanted that he would, during the said term of one year, at his own cost and expense, keep said dwelling-house and premises in good repair,

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(d) As to the right to recover both these items of damage, see *Beach v. Crain*, 2 N. Y. (2 Comst.), 86.

(e) The declaration need not set out the whole of the contract, but only such parts are necessary as relate to the breaches assigned. *Sandford v. Halsey*, 2 Den., 235.

(f) Where the action is founded not on an express covenant, but on a violation of the obligation arising out of the relation of landlord and tenant, in the absence of any covenant, state the

hiring, and set out and annex a copy of the lease. It is not sufficient merely to aver that it was the tenant's duty to keep the premises in repair. In general, it is not enough to aver that such was defendant's duty. The facts out of which the duty arose should be pleaded. *City of Buffalo v. Holloway*, 7 N. Y. (3 Seld.), 493; S. C., 14 Barb., 101; *Congreve v. Morgan*, 4 Duer, 439; *Seymour v. Maddox*, 16 Q. B., 326; S. C., 71 Eng. Com. L. R., 326.

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On Covenant to Repair.

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and at the expiration of said term leave the said dwelling-house and premises in as good condition as he received the same, reasonable wear and tear excepted.]

III. That the defendant entered upon the premises and occupied the same during the said term of one year, under said agreement; but that he has failed to keep the said house and premises in good repair; but, on the contrary, he has left them in such condition that the fences are broken down, the walls and the roof admit the water, and in consequence, the plastering has in many places fallen down, the window-glass is broken [*or other injuries*], (g) and the house and premises are otherwise injured by reason of the neglect of the defendant to keep them in good repair, pursuant to his said agreement, to the damage of the plaintiff        dollars.

433. *Against Landlord, for Breach of Covenant to keep Premises in Repair, with Special Damage.*

I. That on the        day of        , 18    , by a lease in writing, then made between the plaintiff and the defendant, under their hands and seals [*or, under the hand and seal of the defendant*], the defendant leased to the plaintiff the premises known as No.        street, in the city of New York, for one year from that date, at the yearly rent of        dollars.

II. That said lease contained a covenant on the part of defendant, of which the following is a copy: [*copy of covenant to keep in repair*].

III. That the plaintiff entered into possession of said premises under said lease, and used the same as a store and warehouse for storing and selling various articles of dry-goods.

IV. That the defendant has failed to perform said covenant and keep the premises in repair, and has allowed the walls and roof to become and remain leaky, by means whereof the water has entered said premises and utterly ruined a portion of his said goods, and seriously injured others, to the damage of the plaintiff        dollars.

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(g) Voluntary waste by the tenant should be specially stated.

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Actions for Breach of Contract—Covenants in Leases.

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**434. Against Landlord, for Breach of Covenant for Quiet Possession.**

I. That on the                      day of                      , the plaintiff and the defendant entered into an agreement under their hands and seals [*or, under the hand and seal of the defendant*], whereby the plaintiff hired and the defendant leased for the term of                      years from said date, at a yearly rent of                      dollars [*here briefly designate the premises*].

II. That said lease contained a covenant on the part of the defendant, of which the following is a copy: [*copy of covenant for quiet possession*].

[*Or, II.* That the defendant in said lease covenanted with the plaintiff that he should peaceably and quietly occupy and enjoy the premises aforesaid for the said term of                      years.]

III. That the plaintiff has not been permitted peaceably to occupy and enjoy the possession of said premises; but, on the contrary, after the commencement of the term, and on the day of                      , 18                      , one M. N., who was at the time of making said lease, and thereafter, until the last-mentioned day, the lawful owner (*h*) [*or, lawfully entitled to the possession*] of said premises, entered upon the same and ejected this plaintiff therefrom, and has ever since kept him out of possession of the same [*or designate what part*], (*i*) to his damage                      dollars.

IV. [*Allege special damage if any, e. g., as follows:*] That the plaintiff, confiding in the covenant of the defendant aforementioned, had purchased a number of farming utensils and implements of husbandry for the cultivation of said premises,

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(*h*) The breach of the covenant for quiet enjoyment is an actual disturbance of possession by reason of some adverse right existing at the time of the making the covenant; not a tortious disturbance, nor a lawful disturbance by an adverse right subsequently acquired. *Greenby v. Wilcocks*, 2 *Johns.*, 1; *Grannis v. Clark*, 8 *Cow.*, 36; see cases cited, 2 *Greenl. on Ev.*, 239, § 243. As to an entry by the landlord, see *Sedgwick v. Hollenback*,

7 *Johns.*, 376. For other averments of ouster, see Forms 425 and 427.

(*i*) In actions for breach of covenants of warranty and power to convey in a lease, the declaration must state the particulars of the plaintiff's being prevented from taking possession of the premises; that is, as to the person or persons who thus prevented him; and by what right; and show a title at or before the date of the lease declared on *Grannis v. Clark*, 8 *Cow.*, 36.



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On Failure to Build, according to Agreement.

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and had entered upon said premises and commenced to raise grain and fruit thereon, when he was so ejected; and that by reason of the defendant's failure to fulfil said covenant, said farming utensils and implements became of little or no value to him, and he was deprived of the result of his time and labors in cultivating said premises, to the damage of the plaintiff dollars.

[Or, IV. That the plaintiff was thereby prevented from continuing his business of a hatter at the place, and was compelled to expend                      dollars in removing therefrom, and lost the custom of his said business by such removal, to his damage dollars.]

435. *Against Landlord, for Breach of Agreement to Complete Demised Premises Well.* (j)

I. That on the              day of              , 18    , at              , the said plaintiffs entered into an agreement in writing, with the defendants, bearing date on that day, duly executed by the plaintiffs under the firm-name of A. B. & Co., and by the defendants under the firm-name of Y. Z. & Co.; of which agreement the following is a copy: [*copy agreement to complete unfinished warehouse, in the same manner as an adjoining building, and let it to the plaintiff, giving possession on a day named*].

II. That after the making of this agreement, and on or about the              day of              , 18    , the defendants delivered, and the plaintiffs took possession of the first floor and basement of said building, under and in pursuance of said agreement, no lease or other agreement having been made or executed between the parties; and that the plaintiffs took possession thereof upon the faith and assurance of the defendants, and the full belief thereof, that the said premises were finished in the same manner as the store then occupied by M. N., in the same street, and in accordance with the terms of said agreement.

III. That the said premises were not finished in the same manner as the store at the time of making such agreement, occupied by M. N., in the same street, but on the contrary thereof, the roof of the building, and the gutters, water-courses, and

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(j) This is, in substance, the complaint in *Tuller v. Davis*, 4 *Duer*, 187.

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 Actions for Breach of Contract—Employment.
 

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leaders therefrom, were constructed and finished in a different and less perfect manner than those upon that store, and an obstruction was placed over the top of the leader that conducted the water from the said roof of the building, which obstructed and prevented the water from passing off from said roof, whereas no such obstruction was placed over the top of the leader, or gutter, or water-course, from the roof of the store then occupied by said M. N., in the same street.

IV. That in consequence thereof, the water falling upon the roofs of said building mentioned in said agreement, was obstructed and prevented from passing off through the gutters, water-courses, or leader, and was forced back upon and ran through the skylight in the roof, and down into the said first floor and basement, and upon the silks, goods, and wares and merchandise of the said plaintiffs kept therein, and greatly injured the same, to the damage of the plaintiffs                      dollars.

## ARTICLE II.—EMPLOYMENT.

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436. *By an Employee, Discharged, or Prevented from Fulfilling his Contract.*

I. That on the                      day of                      , 18                      , at                      , the plaintiff and the defendants made an agreement in writing, of which

## Employer and Employed.

a copy is annexed, as a part of this complaint [*or*, made an agreement whereby the plaintiff undertook to render his services to the defendant as book-keeper, *or*, as salesman, *or*, as teacher, *or*, &c., as the case may be, from said date to the day of                      , 18    ; in consideration whereof the defendants agreed so to employ the plaintiff during said period, and to pay him for his services at the rate of                      dollars each month].

II. That the plaintiff [entered upon his employment under said agreement, and duly discharged all the duties thereof until the                      day of                      , 18    , and he] has ever since been and still is ready and willing [and on the                      day of                      , 18    , duly offered] to perform all the conditions of said agreement upon his part. (*k*)

III. That the defendant then refused, and still refuses to allow him so to do, or to pay him therefor, to his damage                      dollars. (*l*)

437. *By Employer, for Employee's Refusal to Serve.*

I. That on the                      day of                      , 18    , at                      , the plaintiff and the defendant made an agreement in writing, of which a copy is annexed as a part of this complaint [*or*, made an agreement whereby the defendant agreed to render his

(*k*) Where the plaintiff was wrongfully discharged, an offer to serve need not be averred. *Wallis v. Warren*, 4 *Exch.*, 364; 7 *Dowl. & L.*, 60.

(*l*) In general, in cases of special contract, where one party agrees to do a certain thing or to perform specific services for a stipulated sum of money, and is turned away and forbidden to proceed by the other party, the measure of damages is not the entire contract price, but a just recompense for the actual injury which the party has sustained. See *Clark v. Marsiglia*, 1 *Den.*, 317. And if the party can protect himself from damage at a trifling expense, or by reasonable exertion, he is bound to do so. He can charge the delinquent party only for such damages as by reasonable endeavors and expense

he could not prevent. 2 *Greenl. Ev.*, 273, § 261. A distinction, however, exists between these contracts for specific work and the like, and contracts for the hire of clerks, agents, laborers, domestic servants, &c., for a year or shorter determinate period. In these cases, if the person so employed is improperly dismissed before the term of service is expired, he is entitled to recover for the whole term, unless the defendant, on whom the burden of proof on this point lies, can show, by way of defence, that the plaintiff was actually engaged in other profitable service during the term, or that such employment was offered to him and rejected. *Costigan v. Mohawk & Hudson River R. R. Co.*, 2 *Den.*, 609, and cases cited; 2 *Greenl. Ev.*, 273, § 261 a.

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 Actions for Breach of Contract—Employment.
 

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services to the plaintiff as book-keeper, *or*, as salesman, *or*, as a teacher, *or*, &c., *as the case may be*, from said date to the day of \_\_\_\_\_, 18 \_\_\_\_; in consideration whereof the plaintiff agreed so to employ the defendant during said period, and to pay him for his services at the rate of \_\_\_\_\_ dollars each month].

II. That the plaintiff [has ever been ready and willing to employ the defendant, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_, offered to do so; and has otherwise] duly performed all the conditions thereof on his part.

III. That the defendant entered upon the service of the plaintiff on the above-mentioned day, but afterwards, on the day of \_\_\_\_\_, 18 \_\_\_\_, he refused to serve the plaintiff as afore-said; to his damage \_\_\_\_\_ dollars.

[*Or where the defendant refused to commence service*, III. That the defendant wholly refused to perform said agreement; to the plaintiff's damage \_\_\_\_\_ dollars.]

#### 438. *By Apprentice against Master.*

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_, at \_\_\_\_\_, the defendant, with his [father], M. N., made an indenture under his hand and seal with the plaintiff, a copy of which is annexed, as a part of this complaint.

II. That the plaintiff has duly performed all the conditions thereof on his part.

III. That the defendant has not instructed the plaintiff in the business of \_\_\_\_\_, according to his covenant; to his damage \_\_\_\_\_ dollars.

IV. And for a further breach the plaintiff alleges that the defendant has not allowed or provided for the plaintiff, meat, drink, washing, lodging, and other necessities according to his covenant; to his damage \_\_\_\_\_ dollars.

#### 439. *By the Master against the Father of Apprentice.*

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_, at \_\_\_\_\_, M. N. [*the apprentice*], with the consent of the defendant, made an indenture under his hand and seal, a copy of which is annexed, as a part of this complaint, and marked Exhibit A.

II. That at the same time and place, the defendant made an

## Contract to Manufacture.

agreement under his hand and seal, a copy of which is also annexed as a part of this complaint, and marked Exhibit B.

III. That the plaintiff duly performed all the conditions of said indenture and agreement on his part. (*m*)

IV. That from and ever since the            day of           , 18   , the said M. N. has wilfully absented himself from the service of the plaintiff, (*n*) to the damage of the plaintiff            dollars.

440. *For Breach of Contract to Manufacture Goods.* (*o*)

I. That on the            day of           , 18   , at           , the defendant promised and agreed with the plaintiff to manufacture and deliver to the plaintiff [50,000 slats and 4,500 frames for elliptic spring beds], at the price of           , for which the plaintiff agreed to pay the defendant            dollars.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. That defendant did manufacture, under said agreement [            frames and            slats], but manufactured them in an unskilful and unworkmanlike manner, to the damage of the plaintiff            dollars.

(*m*) The allegation of performance on the master's part is generally unnecessary. 1 *Saund.*, 235; *Philips v. Clift*, 4 *Hurl. & Nor.*, 173.

(*n*) In an action upon a contract of apprenticeship between father and master, containing the following clause: "We the undersigned bind ourselves, so far as it is in our power, to see the following contract fulfilled. I, John G. Young, on my part, that my son Henry shall work as an apprentice to Frederick Van Dorn, five years from the first day of November, in the year 1846; that the said Henry shall be a good, faithful, and obedient apprentice. That he shall comply with the rules and regulations of said Van Dorn's house and shop, so far as such rules are common,"

&c. The breach alleged was, that the son, after having been in the service of the plaintiff, under the contract, about three years and a half, left and abandoned said service, and has not returned, and that the defendant "has not used any, or his best endeavors to have the said Henry serve the said plaintiff as such apprentice," &c., "but the defendant has neglected and refused to fulfil said agreement," &c. *Held*, on demurrer, that the allegations that defendant had not used any endeavors, and refused to do any thing, sufficiently showed a breach. *Van Dorn v. Young*, 13 *Barb.*, 286.

(*o*) This form is sustained by *Fickett v. Brice*, 22 *How. Pr.*, 194.

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 Actions for Breach of Contract—Employment.
 

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· 441. *For Goods Made at Defendant's Request, and not Accepted.*

I. That on the            day of           , 18   , at           , the defendant employed the plaintiff to make for him [*designate articles*], and agreed to pay for the same, upon delivery thereof,            dollars [of which contract a copy is annexed as a part of this complaint].

II. That the plaintiff made the said [*articles*], and on the            day of           , 18   , tendered the same to the defendant, and has ever since been ready and willing to deliver them, and has otherwise duly performed all the conditions on his part.

III. That the defendant has not accepted or paid for the same.

442. *On a Promise to Manufacture Wool into Satinets. (p)*

I. That on, &c., at, &c., the defendant, in consideration that the plaintiff had delivered to him [fifteen bags of wool], of the value of            dollars, to be manufactured into [satinets] for a reasonable compensation, to be paid him by the said plaintiff, the defendant undertook to cause the said wool to be manufactured into satinets, and deliver the same to the said plaintiff early in the next spring thereafter, or as soon afterwards as the same could be done by the defendant and his servants.

II. That the said [wool] was so manufactured by the said defendant, before the            day of           , 18   , on which day the plaintiff, at           , demanded said satinets of the defendant, and then and there offered to pay him a reasonable compensation for such, his services in the said manufacturing.

III. That the defendant then, and ever since, refused and neglected to deliver the same, and has converted them to his own use, to the damage of the plaintiff            dollars.

[Or, II. That the defendant did not manufacture said wool into satinets, although a reasonable time therefor elapsed before this action, to the damage of the plaintiff            dollars.]

[Or, III. That the defendant so negligently and unskillfully manufactured said wool that the satinets were of no value, to the damage of the plaintiff            dollars.]

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Against Printer for Neglect.    Against Builder.

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**443. *Against Printer for not Fulfilling Agreement to Print, and for Injury to the Stereotype Plates. (q)***

*First.* For a first cause of action :

I. That on or about the            day of            , 18    , the plaintiff made a contract with the defendant, whereby the defendant agreed to furnish paper for, and to print and bind for the plaintiff, within thirty days, two thousand copies of a book of memoirs, for the price, and at the rate of \$271 for each thousand copies, payable at three months from the completion of the work.

II. That in accordance with, and for the purpose of fulfilling the contract, the defendant received into his possession, from the plaintiff, the stereotype plates of the book of the value of \$500.

III. That after so receiving them he neglected to fulfil the contract, and afterwards refused to fulfil it, unless the plaintiff would advance thereon about \$250.

IV. That accordingly the plaintiff did, about the            day of            , 18    , advance thereon to the defendant \$188, but after receiving the money defendant refused to fulfil, or to return the plates or the moneys thus advanced, to the plaintiff's damage            dollars.

*Second.* For a second cause of action the plaintiff alleges:

V. That, by the gross carelessness and negligence of the defendant and his servants, the stereotype plates delivered to defendant, as herein before alleged, were destroyed, so that they were entirely lost to the plaintiff, and by reason of which she was put to a great additional expense in printing the two thousand copies agreed on, viz., \$298, and was also subjected to other expense and damage by reason of the delay in the publication, in consequence of which the sale of the book was greatly injured, to her damage            dollars.

**444. *Against a Builder for not Completing his Work; with Special Damage by Loss of Rent.***

I. That on the            day of            , 18    , at            , the plaintiff and the defendant entered into an agreement, under their

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(q) This is, in substance, the complaint in *Badger v. Benedict* (1 *Hill*, 414; affirming S. C., 4 *Abbotts' Pr.*, 176), modified to meet the objection raised in that case, to its stating both as one cause of action.

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 Actions for Breach of Contract—Employment.
 

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hands and seals [*or, the hand and seal of the defendant*], of which a copy is annexed as a part of this complaint [*or state its legal effect, e. g., thus*, whereby the defendant agreed to erect, in a substantial manner, a two-story frame house in the village of \_\_\_\_\_, county of \_\_\_\_\_, and to have the said house completed and ready for occupancy on or before the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, for which this plaintiff agreed to pay him \_\_\_\_\_ dollars, payable as follows: When the foundations should be laid, the sum of \_\_\_\_\_ dollars; when the first story should be up and the second tier of beams laid, \_\_\_\_\_ dollars; when the second story should be up and the third tier of beams laid, \_\_\_\_\_ dollars; and when the roof should be on, \_\_\_\_\_ dollars; and when the house should be entirely completed, the balance of \_\_\_\_\_ dollars].

II. That the plaintiff duly performed all the conditions thereof on his part.

III. That the defendant entered upon the performance of the work under said contract, and laid the foundations of the said house, and commenced the erection of the first story thereof; but has neglected to finish the said building pursuant to said contract, and has left the same with the foundations laid, and the walls of the first story partly up, and that although the time for the completion of said building expired before this action, he refuses to complete the same. (*r*)

IV. That the plaintiff, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, made an agreement with one M. N., whereby he agreed to let, and said M. N. agreed to hire, the said building for one year from the \_\_\_\_\_ day of \_\_\_\_\_, at the yearly rent of \_\_\_\_\_ dollars, of which the defendant had due notice.

V. That by reason of the defendant's failure to complete the contract aforesaid upon his part, the plaintiff has been unable to complete said house so as to give said M. N. occupancy thereof, and has been thereby deprived of the profits of said lease, and has been otherwise greatly injured, to his damage \_\_\_\_\_ dollars.

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(*r*) In an action for breach of a contract to build according to a plan and specifications, an averment merely negating the performance in the words of the contract is insufficient. Enough of the plan and specifications should be stated to show, in connection with proper averments, in what particular the contract was broken or departed from. *So held*, in an action against the builder's surety. *Cooney v. Wignants*, 19 *Wend.*, 504.



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Against Builder for Neglect. Against Attorney.

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445. *Against the Same, for Not Well Finishing a Building.*

I. That on the            day of            , 18    , at            , this plaintiff and the defendant entered into an agreement in writing, under their hands and seals, of which a copy is annexed, as a part of this complaint.

II. That the plaintiff duly fulfilled all the conditions thereof on his part.

III. That the defendant did not fulfil said contract on his part, but on the contrary, erected said building in so unskilful and negligent a manner [and of so unsuitable materials], that, shortly after its completion, the foundation settled, the walls cracked, the roof and walls became leaky, a considerable portion of the plastering fell, and the house otherwise was, and is, entirely untenable, and nearly useless, through the negligent and unskilful manner of its erection, to the damage of the plaintiff            dollars.

446. *Against an Attorney for Negligence in Prosecution of a Suit. (s)*

I. That the defendant being an attorney of the Supreme Court of this State, the plaintiff in or about the month of            , 18    , retained and employed him as such, for a compensation to be paid him therefor, to prosecute and conduct an action in the

                Court on behalf of this plaintiff against one M. N., for the recovery of a large sum of money due from him to this plaintiff, and the defendant undertook to prosecute said action in a proper, skilful, and diligent manner, as the attorney of the plaintiff.

II. That the defendant might, in case he had prosecuted said action with due diligence and skill, have obtained final judgment therein for this plaintiff before the            day of            , 18    , yet he did not do so, but so negligently and unskilfully conducted said action, that by his negligence, delay, and want of skill, he did not obtain judgment until the            day of            , 18    , and that meanwhile said M. N. had become insolvent;

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Actions for Breach of Contract—Employment.

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whereby the plaintiff was hindered and deprived of the means of recovering said sum of money, to his damage                dollars.

447. *Against the Same, for Negligent Defence. (t)*

I. That the defendant being an attorney of the Supreme Court of this State, the plaintiff, in the month of               , 18   , at               , employed him as such, for a compensation to be paid him therefor, to defend on behalf of this plaintiff an action brought against him by M. N., then pending in the Court for the recovery of a large sum of money due from him to this plaintiff, and the defendant undertook to defend said action in a proper, skilful, and diligent manner, as the attorney of the plaintiff.

II. That such proceedings were had in such action, that it became the duty of the defendant as the attorney of this plaintiff to interpose an answer on his behalf to the complaint therein, on or about the                day of               , 18   , but he wholly neglected so to do, and by reason thereof, and through his neglect, judgment by default was obtained against the plaintiff in said action, and by reason thereof this plaintiff was compelled to pay to the said M. N.                dollars, the sum so recovered by him, and was put to costs and charges in his endeavor to defend such action, amounting to the sum of                dollars, and lost the means of recovering the same back from said M. N.

448. *Against the Same, for Negligence in Examining a Title.*

I. That at a time hereafter mentioned, the plaintiff made a contract with one M. N. for the purchase from him of certain real property [*very briefly designate the premises*], for the sum of                dollars, which property said M. N. assumed to have power to convey in fee, and clear of all incumbrances.

II. That the defendant being an attorney, the plaintiff at               , in the month of               , 18   , employed him as such to examine the title of M. N. to said property, and to ascertain if the title were good, and if any incumbrances existed thereon, and to cause and procure an estate therein in fee simple and

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(t) This form is, in substance, from 1 *Humph. Proc.*, 609.

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Against Attorney for Neglect.    Against Physician.

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clear of all incumbrance, to be conveyed to the plaintiff; which the defendant for compensation to be paid to him undertook to do.

III. That the defendant did not so do, but negligently and unskilfully conducted in respect to such examination, and did not use endeavors to cause or procure a good and sufficient title in fee, clear of incumbrance to be conveyed to the plaintiff; but wrongfully advised and induced the plaintiff to pay said M. N. the sum of            dollars, being said purchase-money of the premises, when in fact said M. N. had no title thereto [*or*, when said property was subject to incumbrances to the sum of            dollars, as follows: *specifying them*, and the plaintiff, in order to release the premises from said incumbrances, was compelled to pay the holders thereof the sum of            dollars]; to the damage of the plaintiff            dollars. (*u*)

449. *Against a Physician for Maltreatment.* (*v*)

I. That the defendant being a physician, the plaintiff, at            , in the month of            , 18            , employed him as such to attend the plaintiff to cure him of a malady from which he then suffered, for compensation to be paid therefor, and for that purpose he undertook as a physician to attend and care for the plaintiff. (*w*)

II. The defendant then entered upon such employment, but did not use due and proper care or skill in endeavoring to cure the plaintiff of the said malady, in this: the defendant did not bleed the plaintiff at an early stage of his sickness, when, if

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(*u*) In an action against an attorney for negligence in examining a title, the declaration that there were incumbrances upon the property, is insufficient if the retainer alleged was merely to examine the title and procure a conveyance in fee simple. The declaration in such case must, moreover, show how the property was incumbered. *Elder v. Bogardus, Hill & D. Supp.*, 116.

For other allegations of incumbrances see Form 423, *ante*, p. 340.

(*v*) This form is, in substance, from *Swan's Pl.*, 431.

(*w*) Since, in this country, the employment of a physician raises an implied promise to pay for his services, the plaintiff in an action for malpractice may allege that defendant was a physician, and as such was called on by the plaintiff, and undertook as such to administer medicines, &c. This is sufficient to raise a duty of skill and care on his part. *Peck v. Martin*, 17 *Ind. (Kerr)*, 115.

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 Actions for Breach of Contract—Employment.
 

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the defendant had used due or proper care or skill in that behalf, he would have bled him; and, also, in this: that the defendant, at a subsequent stage of the plaintiff's malady, bled the plaintiff in a profuse and immoderate extent, taking from him        ounces of blood, the same being an excessive and injurious quantity, and which the defendant, if he had used proper care and skill, ought not to have taken; and, also, in this: the defendant, on [ &c. ], and on the fourteen days next following, unskilfully and negligently administered to the plaintiff        grains of mercury every six hours during that time; the same being excessive and injurious doses, and which the defendant, if he had used due and proper care and skill, ought not to have administered to the plaintiff.

III. By reason of the several premises, the plaintiff was injured in his health and constitution, suffered great pain, was weakened in body, and was obliged to, and did expend the sum of        dollars, in endeavoring to be cured of the said sickness, which was prolonged and increased by the said unskilful and improper conduct of the defendant, to the damage of the plaintiff        dollars.

450. *Against a Surgeon, for the Same.*

I. That the defendant, being a surgeon, the plaintiff, at        , in the month of        , 18        , employed him as such [to set and heal the leg of the plaintiff, which was broken], and for that purpose he undertook as a surgeon to attend and care for the plaintiff.

II. That the defendant so negligently and unskilfully conducted himself [in setting and attempting to heal the same, as to bring on inflammation, and make it necessary to have the leg of the plaintiff amputated].

III. That by reason of the defendant's said negligence, the plaintiff was made sick, and kept from attending to his business for        months, and was put to great expense, and has been, and still is, disabled from attending to his said business, to the damage of the plaintiff        dollars.

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 Upon Agreements to Indemnify.
 

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## ARTICLE III.—INDEMNITY.

[In an action upon an ordinary contract of indemnity against damage, the complaint must aver actual damage. Where the plaintiff was compelled to pay by suit, this should be stated, naming the court. On an agreement to save from liability, it is not necessary to aver actual damage.] (x)

451. Surety against principal, on a promise to indemnify him against liability as surety .....p. 363  
 452. Sub-tenant against his immediate lessor ..... 364  
 453. By retiring partner, on the promise of the remaining partner to indemnify him against damage ..... 365  
 454. The same, against sureties in partner's bond to indemnify against liability ..... 366  
 455. Upon defendant's promise to indemnify plaintiff, if he would defend an action brought against him for money which the defendant claimed ..... 368

451. *Surety against Principal, on a Promise to Indemnify him against Liability as Surety.*

I. That on the            day of            , 18    , at            , the defendant, in consideration that the plaintiff would become surety for him by executing a bond [*or other obligation*], of which a copy is annexed as a part of this complaint, the defendant promised and agreed with the plaintiff that he would indemnify him, and save him harmless from and against all damages, costs, and charges which he might sustain by reason of his becoming surety as aforesaid.

II. That the plaintiff, confiding in such promise of the defendant, duly executed and delivered such bond [*or other obligation*].

III. That the defendant did not indemnify the plaintiff, and save him harmless from such damages, costs, and charges; but, on the contrary, the plaintiff, by a judgment, on or about the            day of            , 18    , duly given against him by the Court, at            , in an action brought against him upon said bond, was compelled to pay, and on or about the            day of            , did pay            dollars to            , in satisfaction and

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(x) McGee v. Roen, 4 *Abbotts' Pr.*, 8.

For allegations in an action by a servant, on his employer's promise to indemnify him, see *Allaire v. Ouland*, 2 *Johns. Cas.*, 52.

For allegations of a complaint in an action by the assignor of a contract, upon the assignee's promise to indemnify him against any breach of it, see *Holmes v. Weed*, 19 *Barb.*, 128

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 Actions for Breach of Contract—Indemnity
 

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discharge of said bond, and he incurred also necessary costs and expenses (y) in said action and on account of said bond, to the amount of            dollars. (z)

IV. That the defendant had notice of the premises, but has not repaid any part thereof to the plaintiff.

452. *Sub-tenant against his Immediate Lessor.*

I. That, at the times hereinafter mentioned, the defendant held certain premises [*very briefly designating them*] as tenant thereof to one M. N., at a yearly rent of            dollars, payable by the defendant to said M. N., on the [*state days of payment*].

II. That on the            day of           , 18           , in consideration that the plaintiff then became the tenant to the defendant of said premises [*or, of           , which premises were a portion of the above-described premises*], at a yearly rent of            dollars, payable to him by the plaintiff, the defendant gave to the plaintiff a written agreement to indemnify him, of which the following is a copy [*or state its substance, e. g., thus*, and thereby promised that he would, during the continuance of the tenancy of the plaintiff, indemnify him and save him harmless from and against the payment of the rent payable to M. N. as aforesaid, and from and against all costs, damages, or expenses to which he might be put by reason of any default in the payment thereof].

III. That the defendant, contrary to his promise, omitted to pay the rent which became due from him to said M. N. on the            day of           , 18           , which was during the tenancy of the plaintiff under said agreement.

IV. That by reason thereof said M. N., on the            day of           , 18           , in the Court of           , commenced proceedings

(y) An averment that plaintiff necessarily incurred expenses, is equivalent to an averment that he incurred necessary expenses. *Glover v. Tuck*, 1 *Hill*, 66.

(z) On a covenant to save harmless and indemnify against claims, costs, damages, &c., it is not enough to allege that plaintiff was forced to pay, but the declaration must show how and in what manner. Saying that he was compelled

to pay by a court of competent jurisdiction, is not enough. The court must be named. *Patton v. Foote*, 1 *Wend.*, 207.

But the objection that this is not stated, being one which was not available on general demurrer (*Packard v. Hill*, 7 *Cow.*, 434; affirmed, 5 *Wend.*, 375), can only be taken now by motion to make more definite and certain.

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 Against Partner, for Indemnity.
 

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to recover possession of said premises, which were then occupied by the plaintiff under said agreement, for the non-payment of said rent; and thereby the plaintiff was obliged to pay, and on the            day of           , 18   , did pay to said M. N., to the use of the defendant, the sum of            dollars, the amount of said rent, together with            dollars, the costs and charges of said proceedings; and was put to great trouble and inconvenience, to the damage of the plaintiff            dollars. (a)

453. *By Retiring Partner, on the Remaining Partners' Promise to Indemnify him against Damage.*

I. That the plaintiff and the defendants, having been partners in trade at           , under the firm of B. & Z., on the day of           , 18   , dissolved the partnership, and mutually agreed that the defendants should take and keep all the partnership property, pay all debts of the firm, and indemnify the plaintiff against all claims that might be made upon him on account of any indebtedness of the said firm, and all costs and charges thence arising.

II. That the plaintiff duly performed all the conditions thereof on his part.

III. That the defendants have not paid all said debts nor indemnified the plaintiff therefrom; but, on the contrary, on the            day of           , 18   , one M. N. recovered judgment, (b) which was duly given in the            Court against the plaintiff and defendants, upon a debt due from the said firm to the said M. N., of which debt the defendants had notice but failed to pay, (c) and on the            day of           , 18   , the plaintiff paid            dollars in satisfaction of the same.

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(a) The plaintiff may sue to recover the rent paid, as for money paid to the use of the defendant. See forms, *ante*, p. 163, &c. But where damages beyond that are sought, they should be specially stated as above. For allegations of special damage, see Forms 425, 434, and 444.

(b) In an action founded on a recovery by a third person against the plaintiff, it is unnecessary to aver how the

third person commenced the suit. *Allaire v. Ouland*, 2 *Johns. Cas.*, 52.

(c) Where, after dissolution, one partner sues the other for breaking his covenant to indemnify him against the firm debts, and to pay them, notice of a debt, on account of which suit is brought, need not be averred, especially if it is averred that the books and papers of the firm were transferred to the defendant. It is a general rule in

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 Actions for Breach of Contract—Indemnity.
 

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[IV. And for a further breach the plaintiff alleges, &c., *setting forth any other liabilities.*]

V. That the defendants have not paid the same to the plaintiff.

454. *The Same, against Sureties in Partner's Bond to Indemnify against Liability. (d)*

I. That on the       day of       , 18       , the plaintiff and one M. K., theretofore copartners in business as plumbers, in the city of       , under the firm-name of M. K. & M. G., dissolved their connection as such copartners, and thereupon entered into an agreement in writing, of said date, duly executed and signed by them respectively, and delivered, whereby it was, among other things, mutually agreed that the said M. K. should retain and keep to his sole and separate use all and singular the partnership property of every name and character, whether in action or possession, and wheresoever situated; and in consideration thereof, whereas the said copartnership was indebted to sundry persons in sundry considerable sums of money, he should pay and discharge the debts so due by the said firm to the extent of       dollars from his own individual resources, and to the like extent hold the plaintiff harmless and indemnified, of and from and by reason of any claims or liabilities due by the said firm [*or, instead of stating the substance, say, which agreement contained covenants on the part of the said M. K., of which the following is a copy: copy of covenant.*]

II. That the defendants, in consideration of said agreement between said M. K. and the plaintiff, and of one dollar to each of them then paid by the plaintiff, entered into an understanding in writing, duly executed and signed by them respectively, and delivered to the plaintiff [a copy whereof is annexed as a part of this complaint], whereby they severally undertook and bound themselves to the plaintiff for the faithful performance

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pleading, that where the matter does not lie more properly in the knowledge of the plaintiff than of the defendant, notice need not be averred. *Clough v. Hoffman*, 5 *Wend.*, 499 (d) This is, in substance, the complaint which was sustained on demurrer in *McGee v. Roen*, 4 *Abbotts' Pr.*, 8



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 Against Sureties in Partner's Indemnity.
 

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by the said M. K. of the covenants in said agreement to be kept and performed on said M. K.'s part.

III. That said M. K., under his said agreement with the plaintiff, retained and kept to his sole and separate use all the partnership property of the firm; but has not, pursuant thereto, paid and discharged the debts due by said firm to the extent aforesaid; and has failed to hold this plaintiff harmless and indemnified to the like extent, of and from and by reason of any claim or liabilities due by the said firm.

IV. That at the time of the dissolution of the partnership, and agreement aforesaid, the said firm were indebted to the firm of L. & Co. of \_\_\_\_\_, for merchandise sold and delivered, in the sum of \_\_\_\_\_ dollars, which was then due and payable; (e) which indebtedness formed a part of the \_\_\_\_\_ dollars, debts of M. K. & M. G., and was included among such debts, to be paid by the said M. K., under his agreement aforesaid with the plaintiff; but the said M. K., although requested, would not pay L. & Co. their said demand, or any part thereof.

V. That on the \_\_\_\_\_ day of \_\_\_\_\_ last, an action was duly commenced by the plaintiff, in the Court of \_\_\_\_\_, to recover upon and by virtue of the aforesaid agreement, from the said M. K. the said amount with interest, then due by the said M. K. & M. G. to the said firm of L. & Co., amounting to \_\_\_\_\_ dollars, and interest thereon; and such proceedings were thereupon had, that on the 10th day of December inst., judgment was recovered in such action [which was duly given] in favor of the plaintiff against the said M. K., for the sum of \_\_\_\_\_ dollars, including costs; upon which judgment execution was at once duly issued against the said M. K., and is returned wholly unsatisfied.

VI. That prior to the commencement of said action, the plaintiff caused notice in writing to be served on the defendants respectively, as sureties aforesaid, of his intention to commence such action to compel the payment of the indebtedness aforesaid to said L. & Co., by said M. K., or for him; but the defendants altogether neglected to pay attention to said notice.

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(e) In assigning breaches of a covenant to pay certain accounts, which the plaintiff had paid, &c., it is not necessary to set out the accounts so paid, thereby producing great prolixity. Jones *ads.* Hurlbaugh, 5 N. Y. Leg. Obs., 19.

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 Actions for Breach of Contract—Indemnity.
 

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VII. That the plaintiff has necessarily paid or expended, in consequence of the neglect and refusal of said M. K. to comply with his agreement aforesaid with the plaintiff, at different times since the said            day of           , 18   , in addition to the costs of said action included in said judgment, for legal costs, counsel-fees, disbursements, and for other reasonable expenses, divers sums of money, amounting in the aggregate to            dollars, which remain due and unpaid to the plaintiff by the said M. K., who, although [on the            day of           , 18   ,] requested, refuses to make payment thereof to the plaintiff.

VIII. That the defendants [although, on the            day of           , 18   , requested,] have not paid to the plaintiff the amount of said judgment, or the legal costs, counsel-fees, disbursements, and expenses aforesaid.

*455. Upon Defendant's Promise to Indemnify Plaintiff, if he would Defend an Action brought against him for Money which the Defendant claimed. (f)*

I. That on or about the            day of           , 18   , one M. N. deposited with the plaintiff            dollars.

II. That afterwards, on the            day of           , 18   , the plaintiff, at the request of the defendant, delivered to him the said sum of money of the said M. N., the defendant then claiming the same, and the plaintiff not knowing to whom the same belonged.

III. That the said M. N. then threatened to commence an action at law against him for the recovery of said money.

IV. That afterwards, on the            day of           , 18   , the plaintiff, at the request of the defendant, agreed with the defendant that he would defend any action which the said M. N. should commence against him for the said money; and the defendant, in consideration of the premises, then promised the plaintiff to save him harmless from the consequences of the said action.

V. That the said M. N. afterwards, on [dec.], prosecuted an action against the plaintiff in the Court of Common Pleas, of

## For Breach of Promise.

county, for the recovery of the said sum of money, of which the defendant then had notice.

VI. That the plaintiff, with the privity of the defendant, and to the best of his ability, defended the said action; but the said M. N. in term, 18 , of said court, recovered a judgment against the plaintiff in said action, to the amount of dollars; and afterwards, an execution issued upon the said judgment, and the plaintiff, to prevent his property from being taken on said execution, was forced to pay, and on the day of , 18 , did pay the said sum of dollars, and, also, the sum of dollars for poundage and officer's fees, and other expenses upon the said writ. And the plaintiff was also, by means of the premises, put to other charges and expenses of his moneys, amounting to the sum of dollars, in defending and settling the said action.

## ARTICLE IV.—PROMISE OF MARRIAGE. (g)

456. For refusal.....	p. 369
457. Marriage with another .....	370

456. *For Refusal.*

I. That on the day of , 18 , at , in consideration that the plaintiff, who was then unmarried, would, at the request of the defendant, marry him on request, the defendant promised (h) to marry the plaintiff within a reasonable time (i) [or, on the day of ; or, on request].

(g) Although actions for breach of promise are brought almost exclusively by women, the action lies in behalf of a man, for such loss, properly the subject of damages, as he may be able to show himself to have sustained. *Harrison v. Cage*, 1 *Ld. Raym.*, 386.

(h) That a complaint might be good on demurrer, though not on motion, where, instead of averring a promise, it alleged a conversation in which plaintiff taxed defendant with having made a promise, and defendant dis-

tinctly admitted the charge, see *Buzard v. Knapp*, 12 *How. Pr.*, 504.

(i) This is commonly the tenor of the promise; for a promise to marry without specification of time, gives the party a reasonable time. If, however, the promise were in fact to marry on a set day, it should be so averred. So, also, if it were to marry on request. In the latter case a request must be averred and proved; unless the defendant has, by his own act, incapacitated himself from marrying, in which case it is un-

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 Actions for Breach of Contract—Promise of Marriage.
 

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II. That the plaintiff, confiding in said promise, has always since remained, and now is ready and willing to marry the defendant.

III. That the defendant refuses to marry the plaintiff, although a reasonable time elapsed before this action [*or*, although she, on the            day of           , 18   , requested him so to do], (*j*) to her damage            dollars. (*k*)

457. *Marriage with Another.*

[I. and II., as in preceding form.]

III. That the defendant afterwards married a certain other person, (*l*) to wit, one M. N., contrary to his said promise to the plaintiff.

[*Or*, III. That at the time of making said promise the defendant represented to the plaintiff that he was unmarried, whereas, in fact, he was then married to another person, of which fact the plaintiff had no notice. (*m*)

necessary. *Short v. Stone*, 8 *Q. B.*, 358; *S. C.*, 50 *Eng. Com. L. R.*, 356; *Caines v. Smith*, 15 *Mees. & W.*, 189; *Harrison v. Cage*, 1 *Ld. Raym.*, 386; *Millward v. Littlewood*, 1 *Eng. L. & Eq. R.*, 408; and compare *Lovelock v. Franklyn*, 8 *Q. B.*, 371; *S. C.*, 50 *Eng. Com. L. R.*, 371.

(*j*) Except in the case of a promise to marry on request, the necessity of averring request is dispensed with. 1 *Pars. on Contr.*, 544; *Turner v. Baskin*, 2 *W. Law M.*, 98. An allegation of fraud and intent to deceive and injure the plaintiff, may be struck out on motion. *Leopold v. Poppenhiemer*, 3 *Code R.*, 39.

(*k*) Damages may be recovered in these actions, not only for pecuniary loss, but also for suffering and injury to condition and prospects. 1 *Pars. on Contr.*, 543, and cases cited, *Ib.*, note *i*. And it is held that where, in an action by a female for a breach of promise to marry, it appears that the defendant's promise to marry the plaintiff was made with a view to seduce

her and then abandon her, and that the defendant, by means of the promise, has seduced the plaintiff, the seduction should be regarded as an aggravation of the breach of promise, authorizing the jury to give an increased verdict. *Wells v. Padgett*, 8 *Barb.*, 323.

Evidence of impaired health of the plaintiff is inadmissible, unless that be alleged in the complaint as special damage resulting from the breach. *Bedell v. Powell*, 13 *Barb.*, 183.

Loss of time and expenses incurred in preparation for marriage are grounds of damage, directly incidental to the breach of promise, but not of special damage. *Smith v. Sherman*, 4 *Cush. (Mass.)*, 408.

(*l*) An averment of marriage to another, dispenses with the request to marry, though the promise is so laid; and it is not necessary to aver that the other person is still living. *Short v. Stone*, 8 *Q. B.*, 358; *S. C.*, 4 *Eng. Com. L. R.*, 356.

(*m*) A complaint alleging that the

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 Against Seller of Goods for Not Delivering.
 

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## ARTICLE V.—SALES OF PERSONAL PROPERTY.

458. Against seller, for not delivering .....	p. 371
459. Allegation of part-payment, where there was no memorandum of the contract .....	373
460. Against seller of stock, for not delivering .....	373
461. Against buyer, for refusing to receive and pay for goods .....	374
462. The same, the contract having been made by broker .....	375
463. Against the same, for not delivering note for goods bought .....	375
464. For deficiency after resale by auction .....	376
465. For breach of contract to redeliver goods, or pay for them in a reasonable time .....	377
466. For breach of promise by purchaser of good-will, not to carry on rival trade .....	377

458. *Against Seller, for not Delivering.*

1. That on the            day of            , 18    , at            , the plaintiff and the defendant entered into an agreement [in writing, which was subscribed by the defendant, *or*, by the agent of the defendant duly authorized thereto, and thereby it was mutually agreed between them, as follows:] (*n*) that the defendant should sell and deliver to the plaintiff at            , and on or before the            day of            , 18    [*or*, on demand, *or*, within a reasonable time, *or otherwise, as the case was*], fifty barrels of flour, and that the plaintiff should pay the defendant therefor, upon the delivery of said flour, at the rate of            dollars for each barrel. (*o*)

plaintiff being unmarried and competent to marry, the defendant, in consideration of her promise to marry him, promised to marry her; that the plaintiff is still unmarried; that the defendant was married at the time of making his promise and at the commencement of the action, and that the plaintiff did not, at the time of promising on her part, know or believe that the defendant was married, is sufficient. It is not necessary to allege that the defendant knew his representations to be false. *Blattmacher v. Saal*, 29 *Barb.*, 22; *S. C.*, 7 *Abbotts' Pr.*, 409.

(*n*) As to the necessity of averring

the facts relied on to take the case out of the Statute of Frauds, see p. 209, *ante*. If the contract was in writing, a copy may be annexed or set out, as in Form 461.

(*o*) In an action for not delivering goods, pursuant to an agreement by which plaintiff was to deliver to the defendant a note of a third person to a larger amount in payment, and the defendant to pay the plaintiff the difference;—the agreement to pay the difference is a material part of the contract, and omitting to set it forth was held a material variance at common law. *Roget v. Merritt*, 2 *Cal.*, 117

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 Actions for Breach of Contract--Sales.
 

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[ *Where neither time nor place of delivery were fixed:* ]

II. That on the            day of           , 18   , at           , the plaintiff was ready and willing, and duly offered to receive and pay for said flour, (*p*) and otherwise has duly performed all the conditions thereof on his part.

[ *Where both time and place were fixed:* ]

II. That the plaintiff was ready at the time and place appointed (*q*) to receive said flour, and to pay for the same according to the agreement; (*r*) and otherwise has duly performed all the conditions thereof on his part.

[ *Where the particular time of delivery was not appointed:* ]

II. That on the            day of           , 18   , at the place appointed, the plaintiff was ready to receive said flour, and pay for the same according to the agreement, of which the defendant had due notice; and the plaintiff otherwise has duly performed all the conditions thereof on his part.

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(*p*) The plaintiff must aver an offer or tender of performance on the part of the plaintiff. *Lester v. Jewett*, 11 *N. Y.* (1 *Kern.*), 453. And a complaint averring that the plaintiff was ready to receive and pay for the goods, and requested the defendants to deliver, is not sufficient without an averment of an offer to pay on delivery. *Smith v. Wright*, 1 *Abbotts' Pr.*, 243. But where the delivery is to be at a particular place, it is sufficient to aver a readiness at the place to receive and pay. *Vail v. Rice*, 5 *N. Y.* (1 *Seld.*), 155; *Clark v. Dales*, 20 *Barb.*, 42; and see *Dunham v. Pettec*, 8 *N. Y.* (4 *Seld.*), 508.

Where goods were to be delivered on request, at a certain price, a declaration averring readiness to receive and to pay according to the terms of the sale, and that the defendant had notice of such readiness, but refused to deliver, was held sufficient, without any averment of request. *Rawson v. Johnson*, 1 *East*, 203; 1 *Chit. Pl.*, 327.

(*q*) When one party agrees to sell and deliver goods at a particular place, and the other agrees to receive and pay for them, an averment by the pur-

chaser, of a readiness and willingness to receive and pay at that place, in case he sues for a non-delivery, is essential, though omission of it is cured by verdict. *Clark v. Dales*, 20 *Barb.*, 42.

It is sufficient for plaintiff to aver that he had at all times been ready to receive them, and to pay, without saying that he was ready at the particular time stipulated. *Porter v. Rose*, 12 *Johns.*, 209.

(*r*) Where the buyer of goods sues for the seller's breach of contract to deliver them at a particular time and place, he must prove that he was ready and willing to pay for the goods; but need not prove a tender on demand. *Coonley v. Anderson*, 1 *Hill*, 519; *Vail v. Rice*, 5 *N. Y.* (1 *Seld.*), 155; *Bronson v. Wiman*, 8 *N. Y.* (4 *Seld.*), 182. Compare *Chapin v. Potter*, 1 *Hill*, 366.

So, where plaintiff's obligation depends on an act of the defendant to be done at the same time,—*e. g.*, where plaintiff was to give his own notes on the delivery of the goods by defendant,—an averment of plaintiff's readiness and defendant's refusal is sufficient, without a tender. *White v. Demilt*, 2

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Against Seller of Goods for Not Delivering.

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[ *Where tender and demand are necessary to be proved under the agreement:* ] (s)

II. That on the            day of           , 18   , at           , the plaintiff was ready, and duly offered to the defendant, to receive and pay for said flour pursuant to the agreement, and requested the defendant to deliver the same; and otherwise has duly performed all the conditions thereof on his part.

III. That the defendant refused to deliver it, to the damage of the plaintiff            dollars.

459. *Allegation of Part-payment where there was no Memorandum of the Contract.*

I. That on the            day of           , 18   , at           , it was mutually agreed between the plaintiff and the defendant that the defendant should sell and deliver to the plaintiff at           , and on or before the            day of           , 18 [ *very briefly designate the thing* ], and that the plaintiff should pay to the defendant therefor at the rate of            dollars per           , amounting to            dollars, payable as follows:            dollars at the time of making said agreement, and the residue on the delivery of the            as aforesaid.

II. That the plaintiff thereupon paid to the defendant the sum of            dollars, in pursuance of the agreement.

460. *Against Seller of Stock, for not Delivering.*

I. That on the            day of           , 18   , at           , this plaintiff and the defendant entered into an agreement [in writing, subscribed by the defendant,—or, by the agent of the defendant, duly authorized thereto,—whereby it was mutually agreed between them] that the defendant should sell and deliver to the plaintiff at such time, within            days thereafter,

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*Hall*, 405. As to the place of demand where the place of delivery is not fixed, see *Bronson v. Gleason*, 7 *Barb.*, 472.

(s) Where a sale was of a certain share of growing fruit, with a guaranty that it should be at plaintiff's disposal, it was held that the complaint must aver either that the fruit was not on the trees, or that plaintiff had been interfered with by third persons, in gathering it. Averment of demand and refusal is not appropriate in such a case. *Dabovich v. Emerić*, 7 *Cal.*, 209

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 Actions for Breach of Contract—Sales.
 

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as the plaintiff should elect [*or*, that the defendant then sold and would at such time, within        days thereafter, as the plaintiff should elect, deliver to him],        shares of the capital stock of the        Company, and that the plaintiff should pay him therefor        dollars.

II. That the defendant at the time of making such contract was in the actual possession of the certificate of said        shares of stock [*or*, was entitled in his own right to sell said        shares of stock, *or*, was duly authorized to sell said        shares of stock by some person to this plaintiff unknown, who was entitled to the same in his own right]. (*t*)

III. That the plaintiff duly performed all the conditions thereof on his part.

[*Or*, III. That on the        day of        , 18        , at        , this plaintiff duly tendered to the defendant said sum of        dollars, and demanded of the defendant that he deliver said        shares of stock to the plaintiff.]

IV. That the defendant refused to deliver the same; to the damage of the plaintiff        dollars.

461. *Against Buyer, for Refusing to Receive and Pay for Goods.*

I. That on the        day of        , 18        , at        , the plaintiff and the defendant entered into an agreement in writing [subscribed by the defendant, *or*, by the agent of the defendant, duly authorized thereto], of which the following is a copy: [*copy of the contract, or allege its effect, as in Form 458*].

II. That the plaintiff duly performed all the conditions of said contract on his part, and was, on the        day of        18        [*the day on which delivery was to be made*], ready and willing to deliver the [*goods*] therein mentioned, and on said day, at        , duly tendered the same to the defendant. (*u*)

III. That the defendant refused to accept said goods, and to pay for them pursuant to his agreement, to the damage of the plaintiff        dollars.

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(*t*) See 1 *Rev Stat.*, 710, § 6. The        (*u*) For other allegations of readiness, statute has recently been repealed. &c., see Form 458.  
*Laws of 1858*, 251, ch. 134.



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Against Buyer of Goods for not Completing Purchase.

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462. *The Same, the Contract having been Made by Broker.*

I. That on the            day of           , 18   , the plaintiffs and the defendants entered into an agreement, in writing, by the hand of M. N., a broker duly authorized to make the same, both on behalf of the plaintiffs and of the defendants, of which the following is a copy: [*copy of bought and sold note*].

II. That at the time of making said contract, the defendants paid to the plaintiffs the sum of            dollars mentioned therein.

III. That the plaintiffs were, at all times within said days, ready and willing to deliver the [*goods*] therein mentioned to the defendants, and receive the balance of the price therefor, and in all respects to comply with the terms of said contract on their part, and that within the            days mentioned in said contract, to wit, on the            day of           , 18   , at           , they duly tendered the said [*goods*] to the defendants, and demanded payment of the balance of the price thereof.

IV. That the defendants refused to receive said [*goods*], or pay the balance of the price therefor, to the damage of the plaintiffs            dollars.

463. *Against the Same, for not Delivering Note for Goods Bought. (v)*

I. That on the            day of           , 18   , at           , this plaintiff sold and delivered to the defendant, merchandise [consisting of various articles of hardware], of the value of            dollars.

II. That the defendant then and there promised to give the plaintiff therefor his negotiable promissory note on that day [*or*, on the            day of           , 18   , *or*, on demand, *or*, within a reasonable time thereafter], dated that day [*or*, dated on the            day of           , 18   ], for the said sum of            dollars, payable in            months from said date.

III. That on the            day of           , 18   , at           , the plaintiff duly demanded such note from the defendant, but the defendant refused [*or*, That although a reasonable time for the

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(v) In an action for breach of a promise    an indorsement demanded of the de-  
to indorse a note, the declaration should    fendant. *Gallager v. Brunel*, 6 *Cow.*,  
alleges that the note was prepared, and    346.

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 Actions for Breach of Contract—Sales.
 

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delivery of such note had elapsed before the commencement of this action, yet the defendant has neglected] to deliver such note, (w) to the damage of the plaintiff          dollars.

464. *For Deficiency after Resale by Auction.*

I. That on the          day of          , 18          , at          , the plaintiff sold to the defendant, by auction [*briefly designate the goods*], for the sum of          dollars, subject to the condition that all goods not paid for, and removed by the buyer within          days after the sale, should be resold, by auction, on his account, of which condition the defendant had notice.

II. That the plaintiff was ready and willing to deliver the same to the defendant, on the said day, and for          days thereafter, of which the defendant had notice, and the plaintiff has otherwise duly performed all the conditions of said sale, on his part.

III. That more than          days after the sale, and on or about the          day of          , 18          , at          , the defendant not having taken away said goods, nor paid therefor, the plaintiff resold the same by public auction for account of the defendant for          dollars, pursuant to said condition, the expenses of which resale amounted to          dollars.

IV. That no part of the deficiency of          dollars, thus arising, has been paid.

465. *For Breach of Contract to Redeliver Goods, or to Pay for them in a Reasonable Time.* (x)

I. That on the          day of          , 18          , at          , the plaintiff, at the request of the defendant, delivered to him

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(w) Where goods are sold on credit, with an agreement that a specified security should be given, and the purchaser afterwards fails to give the security, it is held that the purchaser is liable to be sued as soon as his agreement to give security has been broken. If in such case judgment is obtained before the credit is expired, the court may, by virtue of its equity power over

its own judgment, postpone the collection of the judgment until the credit expires, or may vacate it, if the security agreed on is given. And where in such case the purchaser is a non-resident, the plaintiff may have an attachment against him, as a provisional remedy under the Code. *Ward v. Begg*, 18 *Barb.*, 139.

(x) If the contract is in the alterna

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Against Buyer of Good-will, for Carrying on Rival Trade.

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[*briefly describe the goods*], of the plaintiff, of the value of dollars, upon the condition and consideration that the defendant would purchase the same for            dollars [*or, at a reasonable price*], or return the same to the plaintiff within a reasonable time, which the defendant then and there undertook to do.

II. That the plaintiff duly performed all the conditions of said agreement on his part.

III. That although a reasonable time for the defendant to purchase and pay for said goods, or to return the same to the plaintiff had elapsed before the commencement of this action, he has not done so, to the damage of the plaintiff            dollars.

466. *For Breach of a Promise by Purchaser of Good-will, not to Carry on Rival Trade. (y)*

I. That the defendant carried on the business of            , at            ; and on or about the            day of            , 18    , in consideration that the plaintiff would purchase from him his store and goods for the sum of            dollars, and the good-will of the said business for the sum of            dollars, the defendant agreed with the plaintiff that he would not at any time thereafter, by himself, or partner, or agent, or otherwise, either directly or indirectly set up or carry on the business of a            , at            , or at any other place within the town of M.

II. That the plaintiff accordingly purchased from the defendant his said            , for the price and at the terms aforesaid, and paid said sum of            dollars for the good-will of said business.

III. That the plaintiff duly performed all the conditions of said agreement on his part.

IV. That the defendant (z) in violation of his agreement

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tive, it should be set forth, and the alternative shown. See *Hatch v. Adams*, 8 Cow., 35; *Stone v. Knowlton*, 3 Wend., 374; *People v. Tilton*, 13 Id., 597. And where by the contract the defendant has his option to deliver either one of two things, an averment of a demand of one of the two is insufficient. *Lutweller v. Linnell*, 12 Barb., 512.

(y) This form is from *Bullen & L F.*, 155.

(z) If the agreement is by two persons, covenanting jointly and severally that they will not, the complaint in an action against both, must allege a

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Actions for Breach of Contract—Vendor and Purchaser.

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afterwards set up and carried on the business of \_\_\_\_\_, at  
 (a), to the damage of the plaintiff \_\_\_\_\_ dollars.

ARTICLE VI.—SALES OF REAL PROPERTY.

467. Purchaser against vendor.....	p. 377
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467. *Purchaser against Vendor.*

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the defendants and the plaintiff entered into a contract in writing, subscribed by the defendants, whereby it was mutually agreed that the said defendants should sell to the plaintiff certain [leasehold] premises known as \_\_\_\_\_, in \_\_\_\_\_, for the sum of \_\_\_\_\_ dollars, to be paid therefor by this plaintiff; that the defendants should make a good title to the said premises [clear of all incumbrances], and deliver a deed thereof on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_; and that the plaintiff should thereupon pay to the said defendants the said sum.

II. That the plaintiff duly performed all the conditions of said contract on his part. (b) [*Or as in following form.*]

breach by both. It is only where they agree that they and each of them shall not, that alleging a breach by one is sufficient to charge both. *Lawrence v. Kidder*, 10 *Barb.*, 641.

(a) In a declaration for breach of a covenant, wherein the defendant had agreed not to carry on a certain business in any place where the plaintiff should be engaged in the same business, no allegation that the defendant had notice that the plaintiff was thus engaged, is necessary. *Tallis v. Tallis*,

1 *El. & Bl.*, 397, note; 21 *Law J. R. (N. S.)*, Q. B., 269; 16 *Jur.*, 744.

(b) The rule that a vendor is not in default, until the purchaser has demanded a conveyance, and, after waiting a reasonable time for the vendor to prepare it, has again demanded it, is a rule of evidence merely, and the facts need not be set forth specially. *Pearsoll v. Frazer*, 14 *Barb.*, 564.

As to the cases in which demand is necessary, see *Bruce v. Tilson*, 25 *N. Y.*, 194

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 Against Vendor, for Failure to Convey.
 

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III. That the defendants did not on said            day of            , nor have they at any other time whatsoever, given him a deed of the premises pursuant to the agreement, but refused, and wholly failed so to do, to his damage            dollars.

*Or*, III. That there is a mortgage upon the said property, made by            to            , for            dollars, which was recorded in the office of            , on the            day of            , 18            [or, of which the plaintiff then had notice], and which then was and still is an incumbrance on said title [*or any other defect of title*]; and that the defendant could not, and did not make good title pursuant to his agreement, to the damage of the plaintiff            dollars.

468. *The Same, both for Damages for Not Fulfilling Agreement to Convey, and for Redelivery of Securities for Purchase-money. (c)*

*First:* For a first cause of action.

I. That on the            day of            , 18            , this plaintiff and the defendant entered into an agreement in writing, under their hands and seals, whereby the defendant agreed to sell to the plaintiff the farm the defendant then resided on, in the town of Hyde Park, in the county of Dutchess, and containing            acres, or thereabout, for the sum of            dollars per acre; and that he would, on the 1st day of May then next ensuing, at the county clerk's office, in the town of Poughkeepsie, between the hours of eight o'clock in the morning and six in the evening, on receiving from the plaintiff the sum of            dollars per acre, at his own expense execute a proper conveyance for conveying the fee simple of said premises to this plaintiff free of all incumbrances; and the plaintiff agreed that he would, at the time and place above-mentioned, on the execution of such conveyance, pay to the defendant the sum of            dollars per acre as aforesaid; and that in said agreement the defendant acknowledged the payment by the plaintiff of \$1,000, in part-payment of said premises; and further agreed to take a bond conditioned for the payment of six thousand dollars, secured

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(c) This is, in substance, the com- *Seld.*, 525; affirming S. C., 12 *Barb.* ,  
 plaint in *Holmes v. Holmes*, 9 *N. Y.* (5) 137

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 Actions for Breach of Contract—Vendor and Purchaser.
 

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by a mortgage on said premises in payment of \$6,000 of the purchase-money, said bond and mortgage to be payable in one year from said 1st day of May, and to bear interest at six per cent. per annum; and further agreed to pay this plaintiff, on failure of performance, one thousand dollars liquidated damages.

II. That on the [*day agreed*], at [*the place agreed*], the plaintiff was ready and willing to fulfil the agreement on his part in all respects [*or where a tender was necessary*: That on the day of           , 18   , at           , the plaintiff was ready and willing to fulfil the agreement on his part in all respects, and then and there offered to the defendant to accept a conveyance of the premises, and tendered to the defendant a bond and mortgage drawn and executed pursuant to the agreement, and the residue of the purchase-money in cash], and otherwise has duly performed all the conditions of said agreement on his part.

III. That the defendant [refused to convey the said premises, pursuant to the agreement, and he] then could not and cannot now convey a good title to the farm free of all incumbrances, but, on the contrary, the same was and still is subject to various defects and incumbrances, and in particular to a lease made by him to the trustees of the school district for the erection and use of a school-house, and to the inchoate right of dower of the wife of one V. B., who is still living; wherefore the defendant failed to perform his agreement, (*d*) to the damage of the plaintiff one thousand dollars.

*Second.* And for a second cause of action the plaintiff alleges:

IV. That the payment of \$1,000 hereinbefore stated to have been made by the plaintiff to the defendant, in pursuance of the said agreement, was made by a negotiable promissory note for that amount, made by this plaintiff, payable to the order of one W. H., and indorsed by him, which note was delivered to the defendant, and accepted by him in payment of said sum of one thousand dollars; and still remains in his possession.

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(*d*) This averment dispenses with an averment of tender, where tender was not a condition precedent, but only a concurrent condition. *Holmes v. Holmes*, 9 N. Y. (5 Seld.), 525; affirming S. C. 12 Barb., 137.

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 Against Purchaser, for not Completing.
 

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Wherefore the plaintiff demands judgment against the defendant, 1. For the sum of one thousand dollars; and 2. That he be required to cancel and deliver up to the plaintiff said note.

469. *Averment of Defendant's Rescission, as an Excuse for Plaintiff's Non-performance. (e)*

That on the            day of           , 18   , and before the time for the plaintiff to perform the conditions thereof on his part, the defendant gave notice in writing to the plaintiff(*f*) that he had determined not to take the land; and the defendant abandoned the agreement, and ever since wholly failed to perform it, to the plaintiff's damage            dollars.

470. *Against Purchaser, for Not Fulfilling Agreement to Purchase.*

I. That on the            day of           , 18   , at           , the plaintiff and the defendant entered into an agreement in writing, under their hands and seals, of which the following is a copy: [*copy of the contract*].

[*Or, I. That on the            day of           , 18   , at           , the plaintiff and defendant mutually agreed that the plaintiff should sell to the defendant, and that the defendant should purchase from the plaintiff [briefly designate the premises], in the town of           , county of           , and State of           , for            dollars, payable [specify terms].*

II. That on the            day of           , 18   , at           , the plaintiff tendered [*or, was ready and willing, and offered to execute*] to the defendant a sufficient deed of the said premises on payment of the said sum [*or otherwise, according to the contract*], and still is ready and willing to execute the same; and otherwise has duly performed all the conditions thereof on his part. (*g*)

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(*e*) This form is supported by North v. Pepper, 21 Wend., 636. For an averment that defendant made false representations to plaintiff to prevent him from being ready to perform, by reason whereof plaintiff was not ready, see Form 472, *infra*.

(*f*) An averment that one party before the day, refused to perform, should show that the refusal was addressed to the other. Traver v. Halsted, 23 Wend., 66.

(*g*) One or both of these averments may be used according to the covenant

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Actions for Breach of Contract—Vendor and Purchaser.

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III. That the defendant neglected to comply with the terms of the agreement on his part, and wholly failed to pay the purchase-money, to the damage of the plaintiff                      dollars.

*471. Against the Same, for Deficiency on Resale. (h)*

I. That this plaintiff, being the owner in fee of twenty-six lots of land at Harlem, in the twelfth ward of the city of New York, once part of the estate of the late C. H., put them up to sale by auction, at the Merchants' Exchange, in the city of New York, on the 25th day of May, 1852; and announced before the commencement of the sale, as a part of the terms of sale, that ten per cent. of the purchase-money was, on the day of sale, to be paid by the purchaser to the plaintiff, G. F. T., and to the auctioneer, A. J. B., the auctioneer's fee of ten dollars on each avenue lot, and five dollars on each street lot; and that if any purchaser failed to make such payments, the lots would be resold, and he be charged with the deficiency.

II. That at the said sale, H. L. F., the defendant, bid in and became the purchaser of eight lots, four on 132d-street, and four on 133d-street, between the 5th and 6th Avenues, being the lots numbered 132, 133, 134, 135, 154, 155, 156, 157, on the map of of said sale, for the price of \$471 each lot.

III. That the said defendant did not, on the day of sale, or at any other time, pay ten per cent., or any part of the price bid, or the purchase-money, or auctioneer's fees, or any part thereof.

IV. That in consequence of such neglect of payment, and after previous notice given to the defendant of the time and place of resale, and that he would be charged with the deficiency, the said lots were put up to resale, and resold at the price of \$400 for each lot, making a deficiency of \$568 upon the eight lots.

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of the agreement, see *Beecher v. Conradt*, 13 *N. Y.* (3 *Kern.*), 108. Add averments of any special damage, according to the fact.

(h) This is the complaint in *Talmar v. Franklin*, 3 *Duer*, 395.



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Excuse for not being Ready—Vendor against Executor.

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472. *Averment of False Representations by the Defendant, which Prevented the Plaintiff from Fulfilling. (i)*

That on or about the                      day of                      , 18    , and before the time for performance on the part of the plaintiff had arrived, the defendant, for the purpose of preventing the plaintiff from being ready to receive the said                      , and pay therefor, falsely and fraudulently represented to the plaintiff that he had sold said                      to other persons; and that relying on said representations, and solely by reason thereof, the plaintiff did not provide the means, and was not prepared to receive and pay for the same as he otherwise would have done.

473. *By Vendor, against the Executor of the Purchaser. (j)*

I. That on the                      day of                      , 18    , the plaintiff and the said [*testator*] entered into a contract in writing, under their respective hands, of which the following is a copy: [*copy of the agreement*].

II. That said [*testator*] died on or about the                      day of                      , 18    , leaving a last will and testament, by which he devised the said property as follows: [*set forth devise*].

III. That by said will he appointed the defendant his executor, and by an order of the surrogate of the county of                      , duly made on the                      day of                      , 18    , at                      , said will was admitted to probate, and the defendant was then appointed and now is the executor thereof.

IV. That on the                      day of                      , 18    , the plaintiff offered to the defendant to convey the premises to him and the said [*other devisees*], and fully to perform said contract on his part, and requested the defendant to perform said contract on his part and pay the money then due thereon.

V. That the defendant then wholly refused so to do, and has not performed the contract nor paid any part of said sum, to the damage of the plaintiff                      dollars.

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(i) This form is supported by *Crandall v. Clark*, 7 *Barb.*, 169; and *Clarke v. Crandall*, 27 *Id.*, 73.

(j) This form is, in substance, taken from the case of *Brinkerhoff v. Olp*, 35 *Barb.*, 27.

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 Actions for Breach of Contract—Warranties.
 

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## ARTICLE VII.—WARRANTIES.

474. On a warranty of the soundness of a horse. ....	p. 384
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474. *On a Warranty of the Soundness of a Horse.*

I. That on the . day of , 18 , at , the defendant, offering to sell to the plaintiff a certain horse, warranted (*k*) [and fraudulently represented] (*l*) said horse to be sound, kind, and true, and gentle and quiet in harness.

II. That the plaintiff, relying upon said warranty and repre-

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(*k*) It is not necessary, in pleading a mere general warranty of the quality of goods sold, to state whether it was express or implied. A general averment that the seller warranted the article to be of good quality is sufficient. Proof of a warranty of either kind will support such averment. *Hoe v. Sanborn*, 21 *N. Y.*, 552.

(*l*) The words in brackets are not necessary to the cause of action upon the warranty. No averment of knowledge or fraud is necessary to support that action. *Case v. Boughton*, 11 *Wend.*, 106; *Holman v. Dord*, 12 *Barb.*, 336; *Williamson v. Allison*, 2 *East*, 446. But it is well to insert the averment, where it comports with the fact, as the evidence upon the trial may fail to prove a warranty, yet may disclose a fraudulent representation or concealment, upon which, on a complaint in the above form, plaintiff might recover for the deceit. See *Robinson v. Wheeler*, 25 *N. Y.*, 252. The plaintiff, it is held, may be compelled to elect on the trial between the two grounds of liability.

*Springsteed v. Lawson*, 14 *Abbotts' Pr.*, 328. But this case was decided on the authority of *Sweet v. Ingerson* (12 *How. Pr.*, 331), which was regarded as having settled that a false warranty and a fraudulent representation must be deemed different causes of action under the Code. It is to be observed, however, that in *Sweet v. Ingerson* the pleader alleged these as separate causes of action in different counts, and the question was, whether the provisions of the Code relating to joinder of actions justified this, and not whether in alleging a false warranty, fraud in making it might not be alleged as a part of the same cause of action. A motion to strike out such an averment was denied in a case noticed under Form 475.

In *Edick v. Crim* (10 *Barb.*, 445), it was held, that an allegation of false representation, without any allegation of warranty or promise, must be regarded as founding the action on tort, and would not sustain a recovery on a warranty.

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 For False Warranty of Soundness.
 

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sentations, (*m*) then and there purchased said horse, and paid to the defendant therefor the sum of        dollars.

III. That at the time of said warranty and sale the said horse was unsound, unkind, and untrue, and restive and ungovernable in harness, and had an infectious disease, and was utterly worthless(*n*) [*or*, and was worth        dollars less than the defendant represented and warranted], and was known by the defendant so to be; and that said horse still so remains. (*o*)

[*Allege special damage, if any, e. g., as follows:*]

IV. That thereafter said horse infected with said disease three other horses of the plaintiff, of the value of        dollars, by reason whereof one of said horses died, and the others were rendered worthless; and the plaintiff was put to great expense in the care of said horses and in attempting their cure. (*p*)

*Or, thus*, IV. That the plaintiff relying upon the said warranty of the said defendant, afterwards attempted to use the said horse in harness, and the said horse being unsteady, restive, and ungovernable in harness, without the fault of the plaintiff, ran away, greatly injuring and breaking the plaintiff's wagon, and greatly injuring and bruising the plaintiff, whereby the plaintiff became sick, sore, and lame, and was hindered from attending to his work, as a mason, and was put to great expense in repairing his wagon and harness, and in recovering from his hurts.

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(*m*) The complaint must aver, and the evidence show, that the plaintiff was actually misled by relying on the warranty. *Holman v. Dord*, 12 *Barb.*, 336; *Oneida Manufacturing Society v. Lawrence*, 4 *Cow.*, 440.

(*n*) The unsound condition of the chattel should be averred according to the fact. Under an averment (in an answer) that the property was very poor and of very little value, it was held that the defendant could not prove that it was worth nothing, and was of no value. *Deifendorf v. Gage*, 7 *Barb.*, 18.

(*o*) Where there is a warranty of quality, the buyer is not bound, on discovering a defect, to return the goods

in order to sustain an action for a breach. It is doubted whether he has the right to do this. He may, without offering to return, sue for his damages, or recoup them in the seller's action for the price. *Muller v. Eno*, 14 *N. Y.* (4 *Kern.*), 597; reversing *S. C.*, 3 *Duer*, 421; *Waring v. Mason*, 18 *Wend.*, 425; *Boorman v. Jenkins*, 12 *Id.*, 566.

(*p*) The plaintiff may recover not only the difference between the value of the chattel as warranted and as found to be, but also special damages for injuries occasioned by the condition of the chattel, as, the communication of infectious diseases by an animal warranted sound. *Jeffrey v. Bigelow*, 13 *Wend.*, 518.

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 Actions for Breach of Contract—Warranties.
 

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V. That by reason of the premises this plaintiff was injured and misled, to his damage                  dollars.

475. *On a Warranty of the Genuineness of a Note.*

I. That on the                  day of                  , 18                  , at                  , the defendant offering to pass to the plaintiff, for a valuable consideration, a promissory note [*describing it,—e. g., thus*], for the sum of                  dollars, made by one M. N., payable to his own order, and indorsed by him, which note bore date the                  day of                  , 18                  , and was payable                  days from date [*or, a promissory note, of which the following is a copy: copy of the note*], then and there warranted [*and fraudulently represented*], the said note to have been in truth made by the said M. N.

II. That the plaintiff, relying upon said warranty, purchased said note of the defendant, and paid him therefor the sum of                  dollars.

III. That in truth said note was not made by said M. N., but his name was forged thereto.

IV. That by reason of the premises the plaintiff was injured and misled, to his damage                  dollars.

476. *On a Warranty of a Note which Proved to be Usurious by the Law of Another State. (q)*

I. That during the years 1857 and 1858, one M. N., resided at D., in the State of Iowa, and was at that place engaged in the business of a banker, and as dealer in land. That some time in the month of                  , 1857, at S., in the State of New York, said M. N. applied to the defendant, and requested the defendant to loan him two thousand dollars for one year, and it was then and there corruptly, usuriously, and contrary to the statute, agreed by and between said M. N. and the defendant, that the defendant should loan to said M. N. the sum of two

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(q) This is, in substance, the form used in the case of *Fake v. Smith*, which was sustained at special term, Supreme Court, Otsego county, June, 1863, against a motion to strike out many of the special allegations, viz., all

but the first line of paragraph II., the whole of paragraphs IV., VI., IX., X., XII., XIV., and the allegations designated by brackets in paragraphs I., V., VII., and VIII., it being held that these were proper averments.

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 For False Warranty of Usurious Note.
 

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thousand dollars for the term of one year, for interest at seven per cent. per annum; upon condition, however, and with the [understanding and] agreement between said M. N. and the defendant, that said M. N. should, as he therein and thereby promised he would, transport the said sum of \$2,000 to his said place of business, and thereupon reloan the same in said State of Iowa for interest of forty per cent. per annum, and that at the end of said year, said M. N., after repaying the said \$2,000 and interest at seven per cent. per annum in the State of New York, should divide with, account for, and pay over to the defendant one-half of the net proceeds of said loans in the State of Iowa, to wit: one-half of the sum of thirty-three per cent. upon two thousand dollars, amounting to the sum of three hundred and thirty dollars; and it was then and there illegally, corruptly, and usuriously agreed between the defendant and said M. N., that the defendant should have and receive from said M. N., and that he should pay for said loan, or the forbearance of said \$2,000 in New York, more than seven per cent. per annum, to wit: seven per cent. per annum, and the further sum of one-half of the net proceeds of such new loans thereof to be made in the State of Iowa, to wit, sixteen and one-half per cent. per annum, amounting as aforesaid to the sum of \$330.

II. That said agreement was illegal, usurious, and void, and every loan of money in pursuance thereof to be made by said M. N., in Iowa, at and for the yearly rate of forty per cent., or at any greater sum or rate of interest than ten per cent. per annum, then was and ever since has been expressly prohibited by the laws and statutes of said State of Iowa.<sup>(r)</sup> That six per cent. or six dollars for the loan and use of one hundred dollars for one year is the legal rate of interest prescribed by the laws

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(r) To plead that a contract is void by foreign usury laws, the laws should be stated; and the facts which render the contract void according to them should be alleged. *Curtis v. Masten*, 11 *Paige*, 15.

The law of another State must be pleaded as a fact. *Ruse v. Mutual Benefit Ins. Co.*, 23 *N. Y.*, 516; *Bean*

*v. Briggs*, 4 *Iowa*, 464; *Walker v. Maxwell*, 1 *Mass.*, 104; *Throop v. Hatch*, 3 *Abbotts' Pr.*, 23; and see *Andrews v. Herriot*, 4 *Cow.*, 510, *note*.

Pleading foreign statutes by their titles and dates, or statement of their general provisions and requirements, is insufficient. *Carey v. Cincinnati, &c., R. R. Co.*, 5 *Clarke (Iowa)*, 357.

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Actions for Breach of Contract—Warranties.

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and statutes of Iowa; but it is provided and declared by said laws and statutes that the parties to any agreement for the loan of money in Iowa may expressly contract together for a higher rate of interest, not exceeding ten per cent. per annum, and that no person shall directly or indirectly receive in money, goods, or things in action, or in any other manner, any greater sum or value for the loan of money, or upon contract founded upon any bargain, sale, or loan of wares, merchandise, goods, chattels, lands, and tenements, than is therein and thereby prescribed as aforesaid. And it is, and then was further provided by the said laws and statutes, that in case it shall be ascertained in any suit brought on any contract that a rate of interest has been contracted for greater than is thereby authorized as aforesaid, either directly or indirectly in money, property, or other valuable thing, the same shall work a forfeiture of ten per cent. per annum upon the amount of such contract to the school fund of the county in which the suit is brought, and the plaintiff shall have judgment for the principal sum without either interest or costs, and the court in which such suit is prosecuted, shall render judgment for the amount of interest forfeited as aforesaid, against the defendant in favor of said State of Iowa, for the use of the school fund of said county, whether the said suit is contested or not; and in all cases where the unlawful interest is not apparent on the contract or writing, the person contracting to pay the unlawful interest shall be a competent witness to prove that the contract is usurious, and in no case where unlawful interest is contracted for shall the plaintiff have judgment for more than the principal sum, whether the interest be incorporated with the principal or not. And it is, and then was, further provided by the laws and statutes of said State of Iowa that nothing therein shall be so construed as to prevent the *bona-fide* assignee of any usurious contract recovering against the usurer the full amount of the consideration paid by him for such contract, less the amount of the principal money; but the same may be recovered of such usurer in the proper action before any court having competent jurisdiction. The plaintiff further alleges upon information and belief that the defendant then had notice of the aforesaid laws and statutes of Iowa, and that said agreement made as aforesaid between him and said M. N., was, and any and all loans made by said M. N

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 For False Warranty of Usurious Note.
 

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would be illegal and usurious, and could not be enforced in Iowa. (s)

III. That in pursuance of the aforesaid agreement, the defendant did loan to said M. N. the sum of \$2,000, at the Canajoharie Bank, in this State, and thereupon in consideration of said loan, and in pursuance of the agreement aforesaid, at the request of the defendant, said M. N. at Canajoharie aforesaid, made his promissory note in writing for \$2,000 and interest, payable to the order of one O. P., at said Canajoharie Bank, which was indorsed by said O. P. and the defendant, and was thereupon delivered at said Canajoharie Bank to the defendant, or to said bank.

IV. That in pursuance of the agreement aforesaid, said M. N. did transport said \$2,000 so loaned as aforesaid to their said place of business in Iowa, and thereafter in pursuance of the aforesaid agreement, loaned the same in various parcels and small amounts to divers persons in, and residents of Iowa, for the term of one year, at and for the rate of forty per cent. per annum interest, and which said sum of forty per cent. per annum upon the amount so loaned as aforesaid, each and every person contracting for said loans in consideration thereof, promised and agreed to pay to said M. N. That said M. N. thereafter paid and satisfied the said promissory note for two thousand dollars, principal and interest thereon, at seven per cent. per annum, made, executed, and delivered by them as aforesaid, or caused the same to be paid and satisfied.

V. That afterwards [and before the said \$2,000, moneys so loaned by said M. N. in Iowa had become due and payable to, or were collected by said M. N.], to wit, on the 24th day of March, 1858, at S., in the State of New York, said M. N. at the urgent solicitation and request of the defendant, in pursuance of the illegal, corrupt, and usurious agreement aforesaid, executed and delivered to him his promissory note in writing, of which the following is a copy: [*copy of note*], for one-half of the proceeds of said loans of said sum of \$2,000, money loaned as aforesaid in Iowa, to wit, as and for one-half

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(s) This allegation of knowledge, that of itself proves notice of its pro-  
 though, perhaps, proper, seems un- vision. *Dewitt v. Brisbane*, 16 N. Y.,  
 necessary; as when the law is proved, 508.

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Actions for Breach of Contract—Warranties.

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of thirty-three per cent. upon said sum of \$2,000 [informing him, however, at the time of the execution and delivery of said promissory note that the said loans of money in said State of Iowa were not all due, and had not been paid to or collected by said M. N., and that he might not be able to collect any interest thereon because of the illegality of said contracts for the usurious loans thereof. That before said loans made in Iowa became due and payable, a large proportion thereof became, and still remains worthless and uncollectible, and said M. N. has been unable to collect the same, either principal or interest, and has been unable to collect any interest thereon by reason of said loans being illegal and usurious as aforesaid].

VI. That the aforesaid illegal, corrupt, and usurious contract so made between said M. N. and the defendant, and the said sum of sixteen and one-half per cent. on said loan of \$2,000, so illegally, corruptly, and usuriously loaned as aforesaid, one-half the estimated proceeds of said illegal and usurious loans of said \$2,000 so made in Iowa in pursuance of said usurious contract, was the consideration, and the only consideration, for the aforesaid promissory note for \$330 and interest, given to defendants by said M. N. on March 24, 1858.

VII. That after the said note for \$330 and interest, given to defendants by said M. N. on March 24, 1858, became due, to wit, on or about the 18th day of May, 1859, the facts aforesaid being well known to the defendant, but unknown to the plaintiff, the plaintiff bargained with the defendant to purchase of the defendant the last-mentioned promissory note as follows, to wit: that the plaintiff in consideration of said \$330 note should convey to said defendant, his heirs and assigns, by deeds signed and acknowledged by himself and wife, and duly delivered to said defendant, certain lands [*designating them*], for the sum of \$150, and should pay the defendant the balance of the amount of said note made March 24, 1858, by the defendant for \$330, to wit, the sum of \$206.55, or thereabouts, and in consideration that the plaintiff would at the request of the defendant buy the said note and pay him therefor as aforesaid, the defendant represented, promised, warranted, and undertook to, and with the plaintiff, that he was the lawful holder of, and had a just and valid title to the said note; and that the same was a valid and legal note, and that he had a good right to



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 For False Warranty of Usurious Note.
 

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transfer it to the plaintiff, and that he had no knowledge of any facts which rendered the same invalid or illegal, and that said note was not usurious or illegal, and there was no defence thereto, and that said note was given for money lent and other good and valid considerations. [That at the time of said bargain and sale, the defendants did not disclose the facts aforesaid, or any of them to this plaintiff, but intentionally concealed them from him.] (t)

VIII. That he confiding in and relying upon said representations, undertakings, and warranty, did then buy the said \$330 note of the defendant, and conveyed to him the lands and premises above mentioned, and described by deeds executed and acknowledged by himself and wife as aforesaid, and paid them the sum of \$196.55 [and promised to pay them \$10 in addition] therefor, and the defendant in consideration thereof sold, transferred, and assigned the said note to this plaintiff.

IX. That afterwards and on or about, &c., he duly commenced an action in the Supreme Court of this State against said M. N., upon the last-mentioned note, by personal service of a summons therein, and that he appeared in said action and answered therein, setting forth the aforesaid corrupt and usurious agreement, in pursuance of which said note was given, the consideration therefor, and the facts aforesaid. That afterwards and on the 19th day of August, 1862, the plaintiff caused to be personally served on the defendant a copy of said summons, complaint, and answer, together with written notice thereof, and requiring the defendant to assume the prosecution of said action, and to prosecute the same to judgment, but said defendant refused to have any thing to do therewith.

X. That such proceedings were thereupon had in said action, and the same was duly brought on to trial before a referee on the 19th day of January, 1863, the defendants being subpoenaed and sworn on said trial in behalf of this plaintiff. (u) That the said referee after trial duly found and determined therein

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(t) This allegation does not sound in fraud. 21 *How. Pr.*, 14; 27 *Barb.*, 652; 24 *N. Y.*, 607; 1 *Abbotts' Pr.*, 76; 2 *Am. L. R., N. S.*, 663. An action for false warranty is still proper. 3 *E. D. Smith*, 2.

(u) As to this allegation that defendants were sworn, see 12 *Wend.*, 450; 13 *Johns.*, 224; 2 *Cov. & H. Notes*, 4 ed., 132; *Carpenter v. Pier*, 30 *Verm.*, 81; *Walker v. Ferrin*, 4 *Id.*, 523.

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Actions for Breach of Contract—Warranties.

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the facts substantially as above alleged, and the following conclusion of law :

1. That at the time of the commencement of this action the plaintiff was the owner and holder of the note in suit, and that the same was due and unpaid.

2. That the contract or agreement between the defendant and M. N. for the loan of the \$2,000 mentioned in the answer in this action, and in the above findings of fact, was a New York contract, and governed by the laws of this State, and that said contract was usurious and void.

3. That the note in suit being given in fulfilment of said usurious and void contract, is also usurious and void.

4. If the contract in question be regarded as an Iowa contract, and governed by the laws of that State, it is equally usurious and void so far as the note in suit is concerned.

5. Independent of the question of usury, the note in suit being given on an agreement for certain profits on a loan of money, and the proofs showing that there had been no profits realized, the same is without consideration.

6. The plaintiff taking said note after it became due, the same is subject to the defence of want of consideration, the same as in the hands of the payees.

XI. That such proceedings were thereupon had in said action, that on the 14th day of March, 1863, it was duly adjudged and determined therein that the said M. N. (defendant in said action) recover of this plaintiff the sum of \$93.30, his costs and disbursements in said action.

XII. That this plaintiff afterwards, and prior to April 6, 1863, duly paid said judgment and said sum of \$93.30, and caused said judgment to be duly satisfied, and cancelled of record.

XIII. That prior to April 6, 1863, plaintiff necessarily paid, laid out, and expended in the prosecution of said action for attorneys and counsel-fees, disbursements, and other expenses the sum of \$115.80.

XIV. That on the 13th day of April, 1863, plaintiff duly served a copy of the referee's report, and of the judgment in said action on the defendant, and tendered the aforesaid promissory note for \$330, dated March 24, 1858, to the defendant, and demanded a reconveyance of the land which he conveyed to

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For False Warranty of Amount due on Judgment

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him as a part of the purchase price of said note, and repayment of the sum of money paid therewith, as a part of the purchase price of said note, with interest on said sum from the time of such payment, and payment of the amount of the costs and disbursements (viz., \$93.30) recorded against the plaintiff in said action by M. N., and the amount of plaintiff's costs, and disbursements, and counsel-fees necessarily incurred in said action, viz.,                dollars.

XV. That said defendant refused to receive said note, or to reconvey said lots or pieces of land, or any part thereof to this plaintiff, or to pay the said sums or items so demanded, or any of them or any part thereof. (v)

*477. On a Warranty of the Amount due on a Judgment assigned.*

I. That on the                day of               , 18   , the defendant, for a valuable consideration, duly assigned by writing, under his hand [and seal] to this plaintiff a judgment which he had, on the                day of               , 18   , recovered in the Supreme Court, county of                [or, in the                Court], for the sum of                dollars, in a certain action wherein A. B., defendant above-named, was the plaintiff, and one M. N. was defendant.

II. That said assignment contained a covenant on the part of the defendant, of which the following is a copy: [*copy of the covenant*], [or, that the defendant did therein and thereby warrant that there was due upon said judgment, from said M. N., the said sum of                dollars, with interest thereon from the                day of               , 18   ].

III. That in truth, at the time of said assignment, said judgment had been paid in full [or, in part] to the defendant, and no part thereof [or, only the sum of                dollars] was or now is due thereon.

IV. That by means of the premises this plaintiff was injured and misled, to his damage                dollars.

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(v) In the complaint from which this   ment was simply for the aggregate of form is adapted, the demand of judg-   money paid, and value of land, &c.

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 Actions for Breach of Contract—Warranties.
 

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478. *On a Warranty of Title of Chattels sold*

I. That on the            day of           , 18   , at           , the defendant offering to sell to the plaintiff for            dollars, to be paid to him by this plaintiff, a certain pianoforte, warranted (*w*) [and fraudulently represented] (*x*) said pianoforte to be the property of defendant.

II. That the plaintiff, relying on said warranty [and representations], purchased the same from defendant, and paid him therefor            dollars.

III. That in truth said pianoforte was then not the property of defendant, but belonged to one M. N., all which defendant then knew.

IV. That thereafter the said M. N. sued the plaintiff to recover possession of the same; and that the plaintiff gave the defendant due and timely notice of the commencement of said action, and required him to defend the same, or judgment would be suffered by failure to answer; but the defendant neglected to defend said action, and such proceedings were afterwards had therein as that the said M. N. recovered, by legal process, possession of said pianoforte from the plaintiff, with            dollars costs.

V. That by reason of the premises this plaintiff was misled to his damage (*y*)            dollars.

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(*w*) The presumption of law is, that on a sale of chattels the seller warrants his title, unless at the time he expressly disavows an intent to do so (*De Freeze v. Trumper*, 1 *Johns.*, 274; *Heermance v. Vernoy*, 6 *Id.*, 5; *Rew v. Barber*, 3 *Cow.*, 272); or unless the chattel is out of the seller's possession at the time of the sale, in which case, in the absence of fraud, the buyer takes at his own risk. 3 *Kent*, 5 ed., 478; *McCoy v. Artcher*, 3 *Barb.*, 323; *Dresser v. Ainsworth*, 9 *Id.*, 619; *Edick v. Crim*, 10 *Id.*, 445. But as to the soundness of the latter exception, see *Story on Contr.*, § 535.

If the complaint alleges that the thing sold was in the seller's posses-

sion at the time of sale, and a sale for consideration and delivery to the buyer, and failure of title, it need not aver the warranty, for this implied warranty is an inference of law. *Brucker v. Froment*, 6 *T. R.*, 659; *Van Santv. on Pl.*, 287.

(*x*) See note (*m*), *supra*.

(*y*) The measure of damages in an action of deceit or warranty, against the seller, upon a failure of title, is the damages and costs recovered by the true owner against the buyer, with interest thereon. *Blasdale v. Babcock*, 1 *Johns.*, 517; *Armstrong v. Percy*, 5 *Wend.*, 535. But where the article is replevied of the buyer, he can recover only its value from the seller and not

## Form of Action against Agents, &amp;c.

## SECTION XV.

## COMPLAINTS IN ACTIONS AGAINST AGENTS, BAILEES, ETC., FOR UNLIQUIDATED DAMAGES.

[In some cases the action will be purely upon contract, for which a form will be found in the preceding sections; and in many cases it will be simply for conversion (as in section XIX.), where actual wrong is chargeable upon the bailee, independent of the obligations arising out of the relations between him and his employer. (a)]

A mere naked bailee, who undertakes to deliver on demand, is not liable to an action until after demand and refusal, (b) unless a loss by gross negligence is shown. (c)

In actions for unliquidated damages, the plaintiff's general damage is usually averred by concluding the statement of facts with the words, "to his damage        dollars." (d) If he would recover damages which do not neces-

the damages recovered against him for its detention, nor the fees paid by him to his own attorney for defending the title. *Armstrong v. Percy*, *supra*; but compare *Lewis v. Peake*, 7 *Taunt.*, 152.

(a) Thus, for example, trover would not lie if a carrier had lost the goods by his mere omission. *Ross v. Johnston*, 5 *Burr.*, 2825; *Kirkman v. Hargraves*, 1 *Selv. N. P.*, 425; *Dwight v. Brewster*, 1 *Pick.*, 50, 53; *Owen v. Lewyn*, 1 *Ventr.*, 223; *Anon.*, 2 *Salk.*, 655; *Packard v. Getman*, 4 *Wend.*, 613; *Hawkins v. Hoffman*, 6 *Hill*, 586; but see *Ostrander v. Brown*, 15 *Johns.*, 39. But it would lie if he had possession and refused to deliver, or if he had misdelivered the goods, or appropriated them to his own use; for here is a conversion of the plaintiff's goods. *Devereux v. Barclay*, 2 *Barnw. & A.*, 702; *Youl v. Harbottle*, 1 *Peake R.*, 49; *Stevenson v. Hart*, 4 *Bing.*, 483; *Packard v. Getman*, 4 *Wend.*, 613.

(b) *Brown v. Cook*, 9 *Johns.*, 361; *Phelps v. Bostwick*, 22 *Barb.*, 314. Compare *Edson v. Weston*, 7 *Cow.*, 278.

(c) *Beardslee v. Richardson*, 11 *Wend.*, 25.

(d) The form of conclusion of a declaration sounding in damages, under the old practice was, "wherefore the plaintiff saith he is injured, and hath sustained damage to the amount of        , and therefore brings his suit."

See *Wentworth's Prec.* A shorter form in vogue in more recent times was to conclude the averment of the breach with the words, "to his damage dollars." Omission of these words was ground of special demurrer (*O'Conner v. Deehan*, 9 *Irish L. R.*, 506; *Paxton v. Martin*, *Id.*, 508); but was mere matter of form, *Vun Santo on Pl.*, 361.

There is good reason for deening this general allegation of damage unnecessary now. The Code does not require it, and the plaintiff cannot justly be expected to swear to it. It ought to be sufficient after stating the facts, to add, "Wherefore the plaintiff demands judgment against the defendant for        dollars, his damages." As the point has not been fully passed on in any reported case (see *Harper v. Chamberlain*, 11 *Abbotts' Pr.*, 234), we insert the old allegation in deference to the usual practice. All allegations of damage other than special, are dispensed with in England.

## Analysis of the Section.

sarily result from the act complained of, and consequently are not implied by law, he must, in general, state the particulars thereof.] (e)

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(e) *Strang v. Whitehead*, 12 *Wend.*, 64; 15 *How. Pr.*, 261. But the omission to  
*Slack v. Brown*, 13 *Id.*, 390; *Squier v. Gould*, 14 *Id.*, 159; *Bogert v. Burkhalter*, 2 *Barb.*, 525; *Vanderslice v. Newton*,  
 4 *N. Y. (4 Comst.)*, 130; *Molony v. Dows*, *Hilt.*, 514.

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 Against Agent for Negligence in Selling.
 

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## I. AGENTS.

479. *Against an Agent for not Using Diligence to Sell Goods.*

I. That on the            day of           , 18   , at           , the defendant undertook, with the plaintiff, as his agent, and for compensation to be paid by him, to sell for him, \* goods of the plaintiff, to wit [*very briefly designate them*], of the value of            dollars; and thereupon received the same from him for that purpose.

II. That the defendant did not use due diligence to sell or in selling the same, † but unreasonably delayed so to do, and by reason thereof, the same being afterwards sold by the defendant for the plaintiff, produced            dollars less than the same would have produced had the defendant used such due diligence to sell, and in selling the same; and thereby, also, the same became much wasted and deteriorated in value, and the plaintiff incurred            dollars expenses in warehousing the same, to his damage            dollars.

480. *The Same, for Carelessly Selling to Insolvent.*

*As in preceding form to the †, continuing:* but negligently sold the said            for the plaintiff to a person in embarrassed circumstances, without receiving the price therefor, or taking security for the payment thereof; whereby the plaintiff is likely to lose the price, to his damage            dollars.

481. *The Same, for Selling for a Worthless Bill.*

I. *As in Form 479, inserting at the \*, for cash, or an approved bill or note at sixty days or less, and not otherwise [or according to the fact].*

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 Actions against Agents, Bailees, Carriers, &c.
 

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II. That the defendant did not use due diligence in selling the same, but negligently sold the same for a bad and insufficient bill of exchange, having four months to run, and which is worthless and of no value to the plaintiff [and although the same became payable before this action, is unpaid], to the damage of the plaintiff                      dollars.

482. *The Same, for Breach of Instructions as to Sale. (f)*

I. That on the                      day of                      , 18                      , at                      , the plaintiff employed the defendant, for a compensation, to sell                      hogsheads of sugar of the value of                      dollars, for the plaintiff; and that he received the same from the plaintiff for that purpose.

II. That in consideration of the premises, the defendant then promised the plaintiff to use due diligence to sell, and in selling the same for the plaintiff, and in obeying the reasonable directions of the plaintiff in regard to the sale thereof.

III. That the plaintiff afterwards, on or about the                      day of                      , 18                      , directed the defendant to sell said sugar at the price of                      , and not less, in case the same could be obtained by using reasonable diligence in that behalf.

IV. That said direction was a reasonable one, and the defendant, by using reasonable diligence, might and ought to have obtained that price for the sugar.

V. That the defendant did not use due and reasonable diligence in obeying said direction, and neglected to sell the said sugar according thereto, and by reason thereof, the said sugar being afterwards sold by the defendant for the plaintiff, produced                      dollars less than it would have produced had the defendant used such due diligence to sell, and in selling the same; and thereby, also, the said sugar became much wasted and deteriorated in value, and the plaintiff incurred                      dollars expenses in warehousing the same to his damage dollars.

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(f) This form is, in substance, from *Swan's Pl.*, 286.



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Against Auctioneer or Agent for Negligence in Sale or Accounting.

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483. *Against an Auctioneer, for Selling Below the Seller's Limit. (g)*

I. That the defendant being engaged at . . . , in the business of an auctioneer, in consideration that the plaintiff would deliver to him [*very briefly designate the goods*], to be sold by him for the plaintiff for a compensation, undertook, on or about the . . . day of . . . , 18 . . . , to sell the same, \* at and for no less money than the sum of . . . dollars, and not to sell them otherwise.

II. That the plaintiff accordingly delivered said goods to the defendant for that purpose.

III. That the defendant, without the consent of the plaintiff, sold them for less than the aforesaid sum, to wit, for . . . dollars, to the damage of the plaintiff . . . dollars.

484. *Against the Same, for Selling on Credit.*

I. and II. *As in preceding form, substituting at the \* for cash, and not otherwise.*

III. That the defendant afterwards sold said goods on credit without the plaintiff's consent, whereby the plaintiff has hitherto lost, and is likely wholly to lose their value, to his damage . . . dollars.

485. *Against an Auctioneer or Agent, for not Accounting.*

I. *Allege agency, as in preceding form, or thus:* that heretofore [and on or about the . . . day of . . . , 18 . . . ], the plaintiff shipped from the port of . . . , consigned to the defendant, then his agent, at . . . , to sell for cash [*very briefly designate the goods*], of the value of . . . dollars, of which consignment said defendant had notice, and which agency, for a valuable consideration, he undertook and entered upon.

II. That he received said goods [and thereafter sold the same, or some part thereof] on account of the plaintiff.

III. That although sufficient time has elapsed therefor, he has neglected and refused, and still neglects and refuses, to

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Actions against Agents, Bailees, Carriers, &c.

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render to the plaintiff a just and true account of such sale, and of the proceeds thereof, and has also neglected and refused to pay over the proceeds to the plaintiff, to his damage dollars.

486. *For not Properly Stowing a Cargo, whereby the Plaintiff's Freight was Diminished. (h)*

I. That on the            day of           , 18   , at           , the defendant undertook with the plaintiff, for compensation, to superintend the loading and stowing of a cargo of the           , a vessel of the plaintiff at           , for her voyage.

II. That in consideration of the premises, the defendant then promised the plaintiff to use due care and diligence in the loading and stowing the cargo on board the said ship; and accepted and acted upon said retainer.

III. That the said defendant did not use due care or diligence in said loading and stowing, whereby the said vessel could not contain as much cargo as the same would otherwise have been reasonably capable of containing, and the plaintiff was compelled to dispatch the vessel on her voyage with a much smaller cargo than he otherwise would have had on board, and was obliged to decline to receive on board thereof            tons weight of goods, which he otherwise might and would have taken on freight in the said vessel; and the plaintiff was deprived of the gains which would have otherwise arisen to him from having a full cargo, to his damage dollars.

487. *Against a Bank, for Neglecting to Present a Note Lodged with it for Collection. (i)*

I. *For allegation of defendant's incorporation, see pp. 133 and 134, ante.*

II. That the defendants, on or about the            day of           , 18   , received from the plaintiff, he then being a depositor at

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(h) This form is from *Swan's Pl.*, in substance, from the declaration in *Bank of Utica v. Smedes*, 3 Cow., 662, 290.

(i) This and the following form are, 20 Johns., 372.

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 Against Bank or Collecting Agent.    Against Receiptor.
 

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their bank, a negotiable promissory note [*or, bill of exchange*], of which the following is a copy : [*copy of note*].

III. That the defendants, in consideration thereof, undertook and promised the plaintiff to use due diligence in presenting said note, and demanding payment thereof, from the makers [*or, if it is a bill of exchange, from the acceptors*]; and in case of default in payment thereof, according to its tenor [to cause the same to be duly protested for non-payment, and] to cause due notice thereof to be given to M. N., the indorser [*or, drawer*] thereof, whereby to render him liable thereon.

IV. That the defendants \* did not present said [note] for payment on the day of its maturity, but negligently omitted to do so, by reason whereof the plaintiffs have wholly lost the moneys due on said note.

488. *The Same, for not giving Due Notice.*

*As in preceding form to the \* and continue*, presented said [note] on the day of its maturity, and the same was not paid, but that they did not give due notice thereof to the said [*indorser*], but negligently omitted so to do, by reason whereof the plaintiffs have wholly lost the moneys due on said note.

## II. BAILEES, IN GENERAL.

489. *Against a Receiptor.*

I. That on the            day of            , 18    , at            , the defendant received from the plaintiff [then the sheriff of the county of            ], certain goods [the property of one M. N., a judgment-debtor, upon which this plaintiff had levied an execution delivered to him as such sheriff]; and the defendant thereupon gave to the plaintiff a receipt, of which the following is a copy : [*copy receipt*].

II. That on the            day of            , 18    , at            , the plaintiff demanded of the defendant that he deliver said goods or pay said sum of            dollars; but he refused to do so, to the plaintiff's damage            dollars.

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Actions against Agents, Bailees, Carriers, &c.

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490. *Against Bailee, for Not Taking Care of and Returning Goods.*

I. That on the            day of            , at            , the plaintiff delivered to the defendant a quantity of merchandise [*or very briefly designate the articles*], of the value of            dollars, to be by the defendant safely and securely kept for the plaintiff [for a compensation], and to be returned and redelivered to the plaintiff on request.

II. That the plaintiff duly performed all the conditions thereof on his part; and on or about the            day of            , requested the defendant to redeliver the same.

III. That the defendant, not regarding his promise and undertaking, did not take due care of and safely keep the said goods for the plaintiff, nor did he, when so requested, or at any time afterwards, redeliver the same to the plaintiff; but on the contrary, the defendant so negligently and carelessly conducted himself (*j*) with respect to the said goods, and took so little care thereof, that by and through the mere carelessness, negligence, and improper conduct of the defendant and his servants, the goods were wholly lost to the plaintiff, to his damage            dollars.

491. *Against a Watchmaker, for not Using Due Care and Skill in Repairing.*

I. That the defendant, being a watchmaker at            , the plaintiff, on the            day of            , 18    , delivered to him a watch of the plaintiff, of the value of            dollars, to be repaired by the defendant, for reward.

II. That in consideration of the premises, the defendant then undertook said employment, and to use due care and skill in repairing said watch, and to take due care thereof while in his

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(*j*) Where an association for the exhibition of goods, received the plaintiff's goods into their building for exhibition, but the building not being water-tight, the goods were injured by rain beating in,—*Held*, that a complaint seeking to render them liable

therefor, but without alleging negligence or a guaranty, showed no cause of action. Such an association are not liable as common carriers. *Davison v. Association for Exhibition of Industry*, 9 *How. Pr.*, 226.

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Against Watchmaker.    Against Agent Employed to Load Vessel.

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possession, and to redeliver the same to the plaintiff on request.

III. That the defendant did not take due and proper care of the said watch whilst in his possession, whereby the said watch was broken and injured; and he did not use due care or skill in repairing the said watch, but did his work in so careless and unworkmanlike manner, that no benefit was derived therefrom, and the watch was not improved, to the plaintiff's damage dollars.

492. *The Same, for not Returning the Watch.*

I. and II. [*As in preceding form.*]

III. That after a reasonable time for the repair of said watch, and on or about the            day of           , the plaintiff requested the defendant to redeliver the same; but he refused so to do to the plaintiff's damage            dollars.

493. *For Negligence in Loading a Cargo. (k)*

I. That on the            day of           , at           , the plaintiff, at the request of the defendant, caused to be delivered to him [*very briefly designate the goods*], of the plaintiff, of the value of            dollars, to be by the defendant safely and securely loaded on board a certain vessel, at           , for the plaintiff, for a reasonable compensation to the said defendant in that behalf; and the defendant then received the goods for that purpose.

II. That the defendant, not regarding his duty in that behalf, afterwards, by himself and his servants, conducted so carelessly and improperly in the loading of the said goods on board the said vessel, that by their mere negligence and improper conduct, the goods were broken and injured, to the damage of the plaintiff            dollars.

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(k) This form, in substance, is from *Swan's Pl.*, 304.

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Actions against Agents, Bailees, Carriers, &c.

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494. *For Immoderately Driving a Horse.*

I. That on the            day of           , 18   , at           , the defendant hired and received from the plaintiff a horse of the plaintiff, of the value of            dollars, to drive.

II. That the defendant drove the horse so immoderately, and so neglected the care of him, that the said horse afterwards, on the            day of           , 18   , died [*or, that he became lame and hurt, and remained so ever since*], to the damage of the plaintiff            dollars.

495. *For Driving on a Different Journey from That Agreed.*

I. That on the            day of           , at           , the defendant hired and received from the plaintiff a horse [and carriage] of the plaintiff, of the value of            dollars, to drive from to           , and not elsewhere.

II. That the defendant, in violation of the agreement, performed a different journey than that aforesaid, and drove said horse [and carriage] from            to           .

III. That he did not take proper care of said horse [and carriage], but so negligently drove and managed the same that [the carriage was broken], to the plaintiff's damage            dollars.

496. *Against the Hirer of Furniture, &c., for not Taking Care of the Same. (l)*

I. That on the            day of           , 18   , at           , the defendant hired and received of the plaintiff certain goods [*very briefly designating them*], of the value of            dollars, for the period of one year then next, at the sum of            dollars.

II. That the defendant, not regarding his duty in that behalf, did not take due and proper care of the said goods, or use the same in a reasonable or proper manner during the said time, but took so little care of the said goods that they became injured and deteriorated in value, to the plaintiff's damage            dollars.

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(l) See another form, with claim for rent, *ante*, p. 197.

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 Against Carriers of Goods,—for Loss.
 

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## III. CARRIERS.

497. *Against a Common Carrier for Loss of Goods.*

I. That at the times hereinafter mentioned, the defendant was a common carrier [*or*, the defendants were common carriers, (*n*) doing business as such as partners, under the firm of Y. Z. & Co., *or*, were common carriers, jointly interested as such], (*n*) of \* goods, for hire, between the places (*o*) hereinafter mentioned.

II. That on the            day of           , 18   , at           , in consideration of the sum of            dollars then paid [*or*, agreed to be paid] to him by the plaintiff [*or*, of a reasonable compensation then agreed to be paid to him by the plaintiff, *or*, in consideration that the plaintiff delivered to the defendant certain goods hereinafter mentioned], the defendant agreed safely to carry to           , and there deliver to           , or order [*or otherwise, as the case was*], certain goods, the property of (*p*) the plaintiff, (*q*) of the value of            dollars, consisting of [*here briefly*

(*n*) If the defendants are a corporation, that fact may be averred as in Form 499, adding—"and, at the time hereinafter mentioned, being such corporation, were common carriers of goods for hire, between," &c., continuing as above.

(*n*) If the action is upon the contract, a joint contract by all the defendants must be proved. As to when one carrier may be held for a loss occurring on the route of another with whose business he was connected, see 2 *Greenl. on Ev.*, 203, and cases cited; *Hart v. Rensselaer & Saratoga R. R. Co.*, 8 *N. Y. (4 Seld.)*, 37; *Campbell v. Perkins, Id.*, 430; *Wright v. Boughton*, 22 *Barb.*, 561.

*It seems*, that a complaint appropriate merely to a cause of action on the carriers' common-law duty, is not appropriate to authorize a recovery under section 53 of the general railroad act (*Laws of 1850*, 211, ch. 140)—which makes each of two companies whose

railroads connect, liable as carriers for goods received by one company to be transported on the road of the other. *Hempstead v. N. Y. Central R. R. Co.*, 28 *Barb.*, 485.

(*o*) We do not consider it necessary to state the whole route of the defendants. It is enough to show that they were carriers between the place where the goods were received by them and the place where they should have delivered them. See *Clark v. Faxton*, 21 *Wend.*, 153.

(*p*) This allegation will admit evidence of a special property, which is sufficient to maintain the action.

(*q*) The carrier is liable to the consignor or to the consignee for a loss or tardy delivery, according to the right of property. A consignee who has made advances on the goods may maintain the action. *Dows v. Greene*, 16 *Barb.*, 72; *Dows v. Cobb*, 12 *Id.*, 310; *Ogden v. Coddington*, 2 *E. D. Smith*, 317; and see *Fitzhugh v. Wi-*

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*describe the goods*], which the plaintiff then and there delivered to the defendant, who received the same upon the agreement and for the purposes before mentioned. (r)

III. The defendant did not safely carry and deliver the said goods pursuant to said agreement [although on the       day of       , 18       , at       , the plaintiff,—or, said *consignee*,—demanded the same of him]; (s) but, on the contrary, the defendant so negligently conducted and so misbehaved, in regard to the same in his calling as carrier, (t) that they were wholly lost to the plaintiff, to his damage       dollars.

498. *For the Same, for Breach of the Carrier's Duty.* (u)

I. [As in preceding form.]

II. That on the       day of       , 18       , one M. N. delivered

man, 9 *N. Y.* (5 *Seld.*), 559. The consignee is presumptively the owner. *Sweet v. Barney*, 23 *N. Y.*, 335.

(r) If the agreement was in writing or embodied in a receipt, the better way is to set out a copy of it, as in the following form. See *note (x), infra*. Where the defendants, being both carriers and forwarders, took goods in pursuance of a previous oral agreement to *carry*, and gave a receipt for the goods, expressing that they were received "*to be forwarded*,"—*Held*, that they were liable as carriers. *Blossom v. Griffin*, 13 *N. Y.* (3 *Kern.*), 569; and see *McCotter v. Hooker*, 8 *N. Y.* (4 *Seld.*), 497.

(s) Where demand is necessary to perfect plaintiff's right, it must be averred. *Bristol v. Rensselaer & Saratoga R. R. Co.*, 9 *Barb.*, 158.

Where a carrier of goods did not bring the goods to the terminus at which he undertook to deliver them, and had no office or agent there, he was held liable, although the plaintiff had made no demand of them at that place. *Schroeder v. Hudson River R. R. Co.*, 5 *Duer*, 55.

(t) In an action against a carrier, the plaintiff may, under the Code,

allege both a contract and its breach, and wrongs and injuries committed by the defendant in the same transaction. *Jones v. Steamship Cortes*, 17 *Cal.*, 487.

But it is held that if the plaintiff states the custom, and also relies on an undertaking, general or special, as to the same matter, the cause of action in reality is founded on contract, and to be treated as such, in so far that it cannot be united with a claim to recover damages for a mere tort. *Colwell v. N. Y. & Erie R. R. Co.*, 9 *How. Pr.*, 311.

But compare *Adams v. Bissell*, 28 *Barb.*, 382, where the complaint, in an action against the carriers, stated as a first cause of action, that the defendants lost or converted a portion of the goods intrusted to them, and demanded damages therefor; as a second cause of action, that when they delivered the balance, the plaintiffs, not knowing of the deficiency, paid them freight as if the whole had been delivered, and demanded to recover back the excess of freight; and it was held that these claims were properly united in one action.

(u) This form is proper where there was no contract, and the carrier is



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Against Carriers of Goods,—for Loss,—for Delay.

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to the defendants, and they, as such carriers, received certain goods, the property of the plaintiff, to wit [*describe the goods*], of the value of            dollars, to be by the defendants safely carried to           , and there delivered to           , for a reasonable reward to be paid by            therefor.

III. That the defendants did not safely carry and deliver said goods; but, on the contrary, so negligently conducted, and so misbehaved in regard to the same in their said calling as carriers, that the same were wholly lost to the plaintiff, to his damage            dollars.

499. *Against a Common or Private Carrier, on a Special Contract, for Loss of Goods. (v)*

I. [That the defendants are a corporation created by and under the laws of the State of           , organized pursuant to an act of the Legislature of said State, entitled "An Act to Authorize the Formation of Railroad Corporations, and to Regulate the same," passed April 2, 1850 [*or other act*], and the acts amending the same.]

II. That on the            day of           , 18   , at           , the plaintiff delivered to the defendant [*or, if a corporation, to the defendants, being such corporation*], certain goods, the property of the plaintiff, to wit [*describe the goods*], of the value of            dollars, and in consideration (*w*) of the sum of            dollars [*or, of a reasonable compensation*] paid [*or, agreed to be paid*] to him [them] by the plaintiff, the defendant then and there entered into an agreement with the plaintiff in writing, subscribed by the defendant [by his agent duly authorized there-

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sought to be made liable solely as for a breach of his public duty.

(*v*) This form is appropriate where the pleader relies on a special contract, as defining the liability of the carrier in the respect in which a recovery is sought. If the liability on which he relies is that of the carrier's public duty, it should be averred that the defendant was a carrier. *Bristol v. Rensselaer & Saratoga R. R. Co.* 9 *Barb.*, 158

(*w*) In an action upon the contract, a consideration for the carrier's undertaking must be stated, or it will be regarded as having been made without consideration. *Bristol v. Rensselaer & Saratoga R. R. Co.*, 9 *Barb.*, 158. But it is not necessary to state what the consideration was. 2 *Chit. Pl.*, 357, note *d*. And the delivery of the goods is a sufficient consideration. *Streeter v. Horlock*, 7 *J. B. Moore*, 283.

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to], of which agreement the following is a copy: [*copy of the agreement*]. (x)

III. That the defendant did not safely carry and deliver said goods pursuant to his agreement; but he so negligently and carelessly conducted in regard to the same, that they were wholly lost to the plaintiff; (y) [*or, but that he failed to deliver them to* , *although on the* day of , 18 , *at* , *he was requested so to do*], to the damage of the plaintiff dollars.

500. *Against the Same, for Failure to Deliver at the Time Agreed; with Special Damage.*

I. [*For allegation that defendants were common carriers, see Forms 497, 503.*]

II. That on the day of , 18 , at , the plaintiff delivered to the defendants [one hundred fat sheep], of the

(x) Where there is a special agreement, defining the liability of the carrier in the respect in which a recovery is sought, the action must be on the contract for a breach of it, and not as in tort. *Masters v. Stratton*, 7 *Hill*, 101; *Wilbur v. Brown*, 3 *Den.*, 356.

So in *Indianapolis, &c., R. R. Co. v. Rammy*, 13 *Ind.*, 518, it was held that when the contract for the carriage of goods is by a bill of lading, the declaration should be upon such bill, setting out a copy of it.

In such case it may be immaterial that the defendant is a common carrier, since he is liable for the violation of his contract. See 2 *Chit. Pl.*, 356, note a. But it was usual to aver that, in a declaration in assumpsit, as well as to aver negligence on his part, both of which belong rather to an action for breach of the carrier's public duty, than to an action on the contract. As to whether the action should be treated as one on contract, or for breach of public duty, compare the following cases. *Campbell v. Perkins*, 8 *N. Y.*

(4 *Seld.*), 430; *Green v. Clark*, 12 *N. Y.* (2 *Kern.*), 343; *Dorr v. N. J. Steam Navigation Co.*, 11 *N. Y.* (1 *Kern.*), 485; *Thurman v. Wells*, 18 *Barb.*, 500; *Heine v. Anderson*, 2 *Duer*, 318; *Butler v. N. Y. & Erie R. R. Co.*, 22 *Barb.*, 110; *People ex rel. Burroughs v. Willett*, 6 *Abbotts' Pr.*, 37.

(y) If the contract excepts certain perils, it may properly be averred that the loss was not by those perils; but it is not necessary to aver that the loss was not by the act of God, or public enemies, nor in consequence of negligence or fraud of the plaintiff, because the burden of proof is on the carrier to show those facts, if he relies on them. 2 *Greenl. on Ev.*, §§ 219, 220. But if the contract prescribes any conditions, such as notice to the carrier of the contents or value, it must be averred that he had such notice, or that he waived it. *Id.*, § 218. Yet this is held not to apply where the lack of notice was intended to go only to the amount of damages. *Id.*, § 209. For allegation of notice or waiver, see Forms 286, 310, 331.

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Against Carriers of Goods,—for Delay,—for Not Keeping Dry.

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value of                dollars, the property of the plaintiff, which the defendants, in consideration of                dollars [*or*, of a reasonable compensation to be] paid them by the plaintiff, agreed safely to carry to the city of New York, and there deliver to the plaintiff, on or before the                day of, &c. (2)

III. That the defendants did not fulfil their agreement safely to carry the same, and to deliver them in New York on said day; but, on the contrary, although the period between the said [*day of delivery to defendants*] and said [*day on which they should have been delivered to plaintiff*] was a reasonable time for carrying the same from                to the city of New York, yet the defendants so negligently and carelessly conducted [and so misbehaved in regard to the same, in their calling as carriers], (a) that they failed to deliver the same in New York until the                day of               , 18               .

IV. That the market value of said [sheep] in the city of New York on the [*day agreed*] was                dollars, but on the [*day of actual delivery*] was only                dollars; and that by reason of the premises the plaintiff was injured, to his damage                dollars.

501. *Against Carriers by Water, for not Regarding Notice to Keep Dry.*

I. That on the                day of               , 18               , at the port of               , the defendant being master and commander of a vessel known as the               , then lying at said port, (b) the plaintiff caused to be shipped on board said vessel certain [*very briefly designate the goods*] merchandise, the property of the plaintiff, of the value of                dollars [then in good order and well conditioned], (c) in consideration whereof, and of the sum of

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(2) Where the defendant covenanted to carry goods within a certain time, and, if he made default, to deduct from the freight for every day's default,—*Held*, that these were not alternative covenants, and that a declaration by the owner of the goods, in an action to recover back the freight paid under protest, need only set forth the first part and aver a breach. *Harmony v. Bing-*

ham, 12 *N. Y.* (2 *Kern.*), 99; affirming *S. C.*, 1 *Duer*, 209.

(a) Where there was no contract as to the time of delivery, the carrier is only liable for a delay caused by his actual negligence.

(b) If the defendants were common carriers, allege the fact. See Form 497.

(c) Omit these words, if not in the

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 Actions against Agents, Bailees, Carriers, &c.
 

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dollars, then and there paid [*or*, agreed to be paid] by the plaintiff [*or*, by one M. N.] to the defendant [*or*, in consideration of a reasonable compensation by \_\_\_\_\_, agreed to be paid to the defendant therefor], the defendant then and there promised to take care of and safely carry said goods to \_\_\_\_\_, and there safely to deliver them to \_\_\_\_\_, danger of the seas only excepted, and then and there received said goods for that purpose. (*d*)

II. That the plaintiff then and there caused due notice to be given to the defendant, that it was necessary to the preservation of said goods that they should be kept in a dry condition. (*e*)

III. That the defendant failed to take care of or safely to carry said goods; but, on the contrary, not regarding his said promise, so negligently and carelessly carried the same [and so negligently conducted, and so misbehaved in regard to the same in his said calling as a carrier], that they became wet, and thereby entirely ruined [*or state other injury, in its nature and extent, according to the facts*]; which injury was occasioned, not by reason of any danger of the seas, but wholly through the negligence of the defendant and his servants.

IV. That by reason of the premises the plaintiff was injured, to his damage \_\_\_\_\_ dollars.

### 502. *Averment of Loss in Unloading.*

III. That said vessel afterwards safely arrived at \_\_\_\_\_, and no [*excepted perils*], prevented the safe carriage or delivery of the goods.

IV. That the defendant, not regarding his duty in that behalf, did not deliver the said goods to the plaintiff; and for want of due care in the defendant and his servants in unloading and delivering said goods, they were wholly lost to the plaintiff, to his damage \_\_\_\_\_ dollars.

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bill of lading or agreement. 2 *Chit. Pl.*, 365.

(*d*) If the contract was in writing, set it out, as in Form 499.

(*e*) If the carrier have notice, by writing on the article or package, of

the need of peculiar care, he is bound to comply with such directions. See *Baxter v. Leland*, 1 *Abbotts' Adm. R.*, 348; *Hastings v. Pepper*, 11 *Pick.*, 41; and *Sager v. Portsmouth, &c.*, R. R. Co., 31 *Maine*, 228.

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 For Carrier's Unreasonable Delay.
 

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503. *Against Common Carrier, for Failure to Deliver in a Reasonable Time; with Special Damage.*

I. That the defendants are a corporation, created by and under the laws of this State, organized pursuant to an act of the Legislature, entitled "An Act to Authorize the Formation of Railroad Corporations, and to Regulate the same," passed April 2, 1850, and the acts amending the same; and at the times hereinafter mentioned, being such corporation, were common carriers of \* goods for hire, between the places hereinafter mentioned.

II. That on the                      day of                      , 18                      , at                      , at about 11 o'clock, P. M., in consideration of the sum of                      dollars then and there paid [*or*, for a reasonable compensation agreed to be paid] to them by the plaintiff, the defendants agreed to carry to                      , and there deliver to the plaintiff, within a reasonable time after the receipt thereof by them as aforesaid, one hundred cans of milk, the property of the plaintiff, of the value of                      dollars, which the plaintiff then and there delivered to the defendants, who received the same upon the agreement and for the purposes aforesaid.

III. That                      hours was then the usual time occupied by the trains of the defendants in going from                      to                      , and was a reasonable time for the transportation of said milk.

IV. That the defendants failed to deliver the same within that time, pursuant to their agreement; but, on the contrary, so negligently and carelessly conducted, and so misbehaved in respect to the same, in their calling as carriers, (*f*) that they failed to deliver it until                      hours [*or*, days] after it was delivered to them as aforesaid.

V. That by reason of said delay the milk became sour and unmarketable, to the damage of the plaintiff                      dollars.

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(*f*) Where there is no express agreement as to time, actual negligence must be shown, to charge the carrier with damages for a delay in the delivery of goods. *Parsons v. Hardy*, 14 *Wend.*, 215; *Bowman v. Teall*, 23 *Id.*, 306; *Dows v. Cobb*, 12 *Barb.*, 310; *S. C.*, 10 *N. Y. Leg. Obs.*, 161; *Wibert v. N. Y. & Erie R. R. Co.*, 12 *N. Y.* (2 *Kern.*), 245.

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Actions against Agents, Bailees, Carriers, &c.

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504. *Against Common Carrier of Passengers, by Steamboat, for Injuries to the Person.* (g)

I. That at the time hereinafter mentioned, the defendants [being common carriers of passengers for hire, between the places hereinafter mentioned] were the proprietors of a steamboat, (*h*) named the \_\_\_\_\_, employed by them in carrying passengers \* and merchandise on the \_\_\_\_\_ river, from \_\_\_\_\_ to \_\_\_\_\_.

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the defendants received the plaintiff and his wife and his minor child into said boat, for the purpose of conveying them therein (*i*) as passengers from \_\_\_\_\_ to \_\_\_\_\_, for hire [*or*, for a reasonable compensation] paid [*or*, agreed to be paid] to them by the plaintiff.

[*Or*, II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the plaintiff was lawfully, and by permission of the defendants, upon said boat, on the trip from \_\_\_\_\_ to \_\_\_\_\_.] (*j*)

III. That the defendants so negligently and unskilfully conducted themselves in the management of said boat, that, through the negligence and unskilfulness of themselves and their servants, the steam escaped from the boiler and engine, and burned and scalded (*k*) the plaintiff, and his wife and child.

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(g) For complaints for injuries arising out of negligence not respecting the defendant's contract or duties as a carrier, see complaints in actions for NEGLIGENCE, section XVIII.

For complaint in an action brought by the representative of the deceased injured person under the statute, see complaints on CAUSES OF ACTION GIVEN BY STATUTE, section XXII.

(*h*) If the defendants are a corporation, state it as in the preceding form, substituting "passengers" for "goods," at the \* in paragraph I.

(*i*) Where a complaint set forth a contract by the defendants to transport the plaintiff in a particular steamer, and alleged a breach in not conveying the plaintiff in that vessel, without either averring an obligation upon the defendants to provide a substitute in the event of the vessel's loss, or claim-

ing any damage by reason of their neglect or refusal to forward him in some other vessel;—*Held*, that the plaintiff must be confined to the breach specifically alleged, and could not recover upon any other grounds. *Briggs v. Vanderbilt*, 19 *Barb.*, 222.

(*j*) The action may be maintained by one who had no contract with the defendants. *Great Northern Railway v. Harrison*, 26 *Eng. L. & E. R.*, 443; *Philadelphia & Reading R. R. Co. v. Derby*, 14 *How. (U. S.)*, 468.

The burden of proof is on the plaintiff to raise a presumption of negligence in the defendants. *Holbrook v. Utica & Schenectady R. R. Co.*, 12 *N. Y. (2 Kern.)*, 236; affirming *S. C.*, 16 *Barb.*, 113.

(*k*) It is not essential to state the circumstances which produced the disaster. They are facts which may be

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For Injuries Caused by Railroad Disaster.

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IV. That by reason thereof the plaintiff and his said wife and child became, and for a long time remained, ill; the plaintiff was deprived, and for a long time to come will be deprived, of the assistance and services of his wife and child, (l) and was obliged to, and did expend about the sum of                  dollars in attempting the cure of himself and his wife and child, and was, for a number of weeks, prevented from pursuing his business, and was otherwise injured, to his damage                  dollars.

505. *The Same, against a Railroad Company.*

I. That at the time hereinafter mentioned, the defendants, a corporation duly incorporated under the laws of this State, were the owners of a certain railroad, known as the                  Railroad, together with the track, cars, locomotives, and other appurtenances thereto belonging; and were common carriers of passengers \* thereupon for hire, between the places hereinafter mentioned.

II. That on the                  day of                  , 18                  , the defendants received the plaintiff into one of their passenger cars for the purpose of conveying him therein, and upon said railroad, as a passenger from                  to                  , for the sum of                  dollars [or, for reward paid, or, agreed to be paid] to the defendants by the plaintiff.

[Where the accident was caused by a collision.]

III. That while he was such passenger, at                  [or, near the station at                  , or, between the towns of                  and                  ], a collision occurred on the said railroad, caused by the negligence of the defendants and their servants, by which said car was struck,

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supposed to lie within the defendants' knowledge. And a general averment of negligence will suffice to let in evidence at the trial of the particular defect. *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 *N. Y.* (4 *Kern.*), 310.

(l) It is held that damages arising from bodily pain and suffering need not be specially alleged. *Curtis v. Rochester & Syracuse R. R. Co.*, 20 *Barb.*, 282. Nor need prospective suffering and loss from permanent injury

to the plaintiff; but prospective loss of services of a child must be specially alleged. *Gilligan v. N. Y. & Harlem R. R. Co.*, 1 *E. D. Smith*, 453; *Ford v. Monroe*, 20 *Wend.*, 210. An action to recover damages for injuries sustained by a minor child must be in the child's name; but where the claim is for loss of services or for medical attendance, in the name of the father. *Barnes v. Perine*, 15 *Barb.*, 249, and cases there cited.

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Actions against Agents, Bailees, Carriers, &c.

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and the plaintiff was much injured, being bruised and cut upon the head and face, and rendered insensible [*or otherwise, according to the fact*].

[*Where the accident arose from defect in the car or track.*]

III. That the car used by the defendants to convey the plaintiff [*or*, the track of the defendants' road between                      and                      ] was at the time defective and unsound, and unfit to be used for that purpose; which the defendants might and would then and theretofore have known by due care; but not regarding their duty, they negligently suffered it to be used, and while said car was proceeding with the plaintiff therein, from                      to                      , it was by reason of said defect and unsoundness [and the negligence of the defendants and their servants] thrown from the track, and one of the legs of the plaintiff was fractured, and the plaintiff otherwise bruised and injured.

[*Where the plaintiff was obliged to leap off to save himself.*]

III. That the defendants and their servants, in managing their cars in which plaintiff was thus a passenger, were so careless and negligent that it was unsafe for him to remain in one of them; and that, in order to free himself from the danger, he was obliged to jump from the car, (*m*) and in doing so was much injured [*&c., as above*].

IV. That by reason thereof, the plaintiff became for a long time ill; was obliged to, and actually did, expend about the sum of                      dollars for surgical and other treatment and attendance in attempting to cure himself; was compelled to have his leg amputated, and has thereby become a cripple, and prevented for life from actively pursuing his business; and was otherwise injured, to his damage                      dollars.

506. *The Same, Against the Proprietor of a Stage-coach.*

1. That on the                      day of                      , 18                      , the defendant was a common carrier of passengers \* by stage-coach from                      to                      , for hire.

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(*m*) This is sufficiently certain without stating all the circumstances that                      produced the peril. *Eldridge v. Long Island R. R. Co.*, 1 *Sandf.*, 89



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 For Loss of Baggage, by Carrier or Innkeeper.
 

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II. That on that day, at \_\_\_\_\_, he received the plaintiff upon his coach, to be carried thence to \_\_\_\_\_, for hire.

III. That not regarding his duty, he did not use due care therein, but, by the negligence and improper conduct of the defendant and his servants, the coach was overturned, and the plaintiff was bruised and wounded [or, the plaintiff was thrown off the coach, and thereby bruised and wounded], inasmuch that he became ill and lame, and was prevented for months from attending to his business [and for a long time to come will be so prevented], and necessarily incurred expenses to the amount of \_\_\_\_\_, in getting to \_\_\_\_\_, and in endeavoring to be cured, to his damage \_\_\_\_\_ dollars.

### 507. *For Loss of Baggage.*

I. *As in some preceding form, inserting at the \*, and their baggage.*

II. That on that day he received into his \_\_\_\_\_ the plaintiff with his baggage, to wit, [two trunks containing his wearing apparel and necessary money for his journey], to be carried from \_\_\_\_\_ to \_\_\_\_\_, for hire.

III. That the defendant, not regarding his duty, did not use proper care therein, but, by the negligence and improper conduct of him and his servants, said trunks with their contents were wholly lost, (n) to the damage of the plaintiff \_\_\_\_\_ dollars.

### IV. INNKEEPERS.

#### 508. *For Loss of Trunk, or Contents.*

I. That at the times hereinafter mentioned, the defendant was the keeper of a common inn in the city of \_\_\_\_\_, known as "The \_\_\_\_\_ House." (o)

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(n) It is not necessary for the plaintiff to aver in his complaint that the trunk was lost without his fault. It was enough that the plaintiff states the delivery to the defendants, and that the loss occurred through their negligence. *Richards v. Westcott*, 2 Bosw., 589.

(o) The proprietor of a hotel in a city, who receives transient persons as guests, is liable as a common innkeeper for loss of his guest's baggage. *Wintermute v. Clarke*, 5 Sandf., 242; *Taylor v. Monnot*, 4 Duer, 116; S. C., 1 *Abbotts' Pr.*, 325; and see *Willard v. Reinhardt*, 2 E. D. Smith, 148.

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 Actions against Agents, Bailees, Carriers, &c.
 

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II. That on the            day of           , 18   , this plaintiff [*or*, one M. N., the infant son, *or*, the servant of this plaintiff], was received by the defendant into his said inn as a traveller, (*p*) together with his baggage, to wit, a trunk containing [*here designate contents lost*], the property of the plaintiff.

III. That the defendant and his servants so negligently and carelessly conducted themselves in regard to the same, that while he so remained at said inn, his said trunk was taken away [*or*, was broken open, and said            was taken away] from the room of the said [*guest*] by some person or persons to the plaintiff unknown; (*q*) and thereby the same became wholly lost to the plaintiff, (*r*) to his damage            dollars.

509. *Against Proprietor of Bathing-house, for Loss of Pocket-book.*

I. That the defendant, at the time hereinafter stated, was a common innkeeper at the town of            in this State.

II. That on the            day of           , 18   , he received and entertained this plaintiff as a guest at his inn, for hire.

III. That the inn of the defendant was upon the sea-shore, and in connection with it the defendant maintained bathing-houses for the safe-keeping of the clothing, wardrobe, and such money and jewelry of his guests as are usually carried upon the person of guests and patrons of his inn and bathing-house.

IV. That while the plaintiff was then and there his guest, the defendant undertook, for compensation paid him by the plaintiff, to keep safely in one of his said bathing-houses, the clothing and such articles of jewelry and valuables as the plaintiff then had upon his person, while the plaintiff should bathe; and that the plaintiff thereupon put into his said bathing-house his clothing, his pocket-book containing money and

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(*p*) Averring that defendant was an innkeeper, and as such received horses from a third person, to be kept, sufficiently imports that the latter was a guest. *Peet v. McGraw*, 25 *Wend.*, 653.

ligence in such case. *Clute v. Wiggins*, 14 *Johns.*, 175; *Willard v. Reinhardt*, 2 *E. D. Smith*, 148.

(*r*) Demand before suit is not necessary, where the goods are lost. *McDonald v. Edgerton*, 5 *Barb.*, 560; *Willard v. Reinhardt*, 2 *E. D. Smith*, 148.

(*q*) It is not necessary to prove neg-

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Against Innkeeper.    Against Pledgee.

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such other property as is usually carried upon the person, of the value of                  dollars, and left the same in the possession and charge of the defendant, both as innkeeper and as special bailee as aforesaid.

V. That while this plaintiff was bathing, his pocket-book and money were, by the negligence, carelessness, and dishonest management of the defendant and his servants, lost and stolen.

[VI. That the amount of the said money belonging to the plaintiff so lost and stolen, while the same was under the charge of the defendant, was                  dollars and upwards, in lawful money of the United States, and current bills of solvent banks, and sundry small silver coins of trifling value; and that the plaintiff is by profession [*designating a business requiring the plaintiff to carry considerable sums*], and that said sum was such an amount as he might reasonably and properly carry with him with reference to his circumstances in life, and the nature of his business.]

VII. That the said inn was upon the sea-shore, and that facilities for bathing according to the custom of the neighborhood, and as the defendant then well knew, were considered a part of the accommodations necessary to be afforded by the innkeepers in that vicinity.

VIII. That by said negligent, careless, and dishonest dealing of the defendant and his servants, the plaintiff has sustained damage in the sum of                  dollars.

## V. PLEDGEES. (s)

### 510. *For Loss of Pledge.*

I. That on the                  day of                  , 18                  , at                  , the plaintiff delivered to the defendant [*briefly designate the thing*], the property of this plaintiff, of the value of                  dollars, by

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(s) If there has been a conversion of the pledge, recovery may be had on the ordinary complaint for conversion (see *infra*); it is not necessary to sue the pledgee specially in his character as such. In respect to the right of the pledgee to sell the pledge on default of payment, it may be added that he can sell only upon notice to the pledgor. *Stearns v. Marsh*, 4 *Den.*, 227; 2 *Kent's Com.*, 749; *De Lisle v. Priestman*, 1 *Browne (Pa.)*, 176; and see *Hart v. Ten Eyck*, 2 *Johns. Ch.*, 62. And the sale, in the absence of an agreement to the

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 Actions against Agents, Bailees, Carriers, &c.
 

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way of pledge to the defendant to secure the sum of        dol  
lars theretofore loaned by the defendant to the plaintiff [and  
interest thereon; *or other indebtedness*], which [*pledge*] the de-  
fendant received for that purpose, and agreed with the plaintiff  
to take good care of until it should be redeemed by the  
plaintiff.

II. That the defendant has failed to fulfil said agreement on  
his part, and on the contrary took so little care of, and so neg-  
ligently kept said [*pledge*], that while it was in his possession  
for the purposes aforesaid, it was through his negligence lost,  
to the damage of the plaintiff        dollars.

### 511. *For Injury to Pledge.*

I. [*As in preceding form.*]

II. That the defendant, not regarding his promise, so negli-  
gently conducted in respect to said [*pledge*], and so carelessly  
used the same, that it became, by reason of his negligence and  
carelessness, greatly damaged [*state briefly the injury, in its  
nature and extent, as the case was*], to the damage of the plain-  
tiff        dollars.

## VI. WAREHOUSEMEN.

### 512. *For Loss of Goods.*

I. That on the        day of        , 18    , at        , the de-  
fendants, in consideration of the sum of        dollars, then and

contrary, must be made by public auc-  
tion. *Castello v. City Bank*, 1 *N. Y. Leg. Obs.*, 25; *Jones v. Thurmond*, 5  
*Texas*, 318; and see *Rankin v. McCul-  
lough*, 12 *Barb.*, 103. No agreement  
entered into by pledgor, at the time of  
depositing a pledge, that in case of de-  
fault the pledge shall immediately be-  
come the absolute property of the  
pledgee, can defeat the right of the  
pledgor to have notice of the sale. 2  
*Kent*, 748, and authorities there cited;  
*Hart v. Burton*, 7 *J. J. Marsh.*, 322;  
*Lucketts v. Townsend*, 3 *Texas*, 119;

and see *Cortelyou v. Lansing*, 2 *Cal. Cas.*, 200. The notice also should ap-  
prise the pledgor of the time and place  
of sale; as the object is not that the  
notice should operate as a demand, but  
that the pledgor should be enabled to  
bid at the sale, or to procure a good bid  
to be made, &c. See *Brown v. Ward*,  
3 *Duer*, 660; *Castello v. City Bank*, 1  
*N. Y. Leg. Obs.*, 25; *Willoughby v. Comstock*, 3 *Hill*, 389; *Tucker v. Wil-  
son*, 1 *Bro. P. C.*, 494; *S. C.*, 1 *P. Wms.*,  
261; *Lewis v. Graham*, 4 *Abbotts' Pr.*,  
106.

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For Injury to Goods.   For Refusal to Deliver.

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there paid [*or*, agreed to be paid; *or*, of a reasonable compensation agreed to be paid] to them by the plaintiff, agreed to store and safely keep in their warehouse at                      certain merchandise, the property of the plaintiff, of the value of                      dollars, consisting of [*here briefly describe goods*], until the same should be called for by the plaintiff [*or*, for the term of two months from said date, *or otherwise*], and then safely to deliver said goods to the plaintiff [*or his order*] at his request, (*t*) and then and there received the same for that purpose.

II. That the defendants neglected to take proper care of said merchandise; and through the negligence of themselves and their servants, the same became wholly lost to the plaintiff, to his damage                      dollars.

513. *For Injury to Goods, by Neglect to Obey Instructions.*

I. [*As in the preceding form.*]

II. That at the time of the delivery of said goods to the defendant the plaintiff caused the defendant to be informed that it was necessary to the preservation of said goods that they should be kept in a dry condition [*or*, be handled with care].

III. That the defendant negligently allowed the same to become wet [*or*, to be handled without care, and roughly moved and broken], so that the same, through the negligence of the defendant and his servants, became greatly injured [*or*, entirely ruined], to the damage of the plaintiff                      dollars.

514. *For Refusal to Deliver.*

I. [*As in Form 512.*]

II. That on the                      day of                      , 18                      , at                      , the plaintiff requested the defendant to deliver the said goods, and tendered him                      dollars [*or*, the amount due thereon for storage], but the defendant refused to deliver the same; to the damage of the plaintiff                      dollars.

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(*t*) If there was a written contract, the better course is to set it out.

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 Actions against Sheriffs.
 

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515. *For not Forwarding Goods according to Agreement.*

I. That at the time hereinafter mentioned, the defendant was a forwarding agent and keeper of a warehouse at \_\_\_\_\_, for the reception of goods intended to be forwarded by him for hire, from \_\_\_\_\_ to \_\_\_\_\_.

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, the defendant received from the plaintiff certain merchandise, to wit [*briefly describing it*], the property of the plaintiff, of the value of \_\_\_\_\_ dollars, which he undertook for hire to forward in a reasonable time from \_\_\_\_\_ to \_\_\_\_\_, by [a vessel], and meanwhile to store and safely keep the same.

III. That after the defendant received said goods, such a [vessel] did, within a reasonable time then following, proceed from said \_\_\_\_\_ to \_\_\_\_\_, and the defendant might and ought to have delivered the said goods to the [master of such vessel] for the purpose aforesaid.

IV. That the defendant did not do so, or otherwise forward said goods within a reasonable time, but kept and detained the same in his said warehouse, for a long and unreasonable time, to wit, two months, whereby the said goods perished; to the damage of the plaintiff \_\_\_\_\_ dollars.

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 SECTION XVI.

## COMPLAINTS IN ACTIONS AGAINST SHERIFFS.

[These forms are appropriate for cases where a sheriff is sued for a breach of his official duty. Complaints in actions on his bond are given, *ante*, p. 269.

Where a sheriff is sued for a levy or arrest which was unauthorized, it is not necessary to aver his official character. The forms given for ordinary actions for injuries to property or person will be appropriate.](a)

(a) An officer having made a proper levy, cannot be sued in trover by the debtor for a part of the goods which was not sold, without proving a demand that he redeliver them, and a refusal. *Whitmarsh v. Angle*, 3 *Code R.*, 53; *S. C.*, 1 *Am. Law R.*, *N. S.*, 595.

Where a debtor's property levied on is

such that he is entitled to have a certain amount or value of it exempt, he should before suing for its detention, give notice to the officer that he claims that it is exempt, demanding a redelivery, and give the officer an opportunity to comply. *Seaman v. Luce*, 23 *Barb.*, 240

But it is not necessary in the com.

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 For Neglect to Return Process.
 

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516. For neglecting to return execution .....	p. 421
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### 516. *For Neglecting to Return Execution. (b)*

I. That at the time of the issuing of the execution hereinafter mentioned, the defendant was the sheriff of the county of \_\_\_\_\_, in this State. (c)

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, in an action in the Supreme Court of this State, in the county of \_\_\_\_\_ [or, in the County Court of the county of \_\_\_\_\_, in this State, or other court, or, before K. L., a justice of the peace in and for the town of \_\_\_\_\_, in the county of \_\_\_\_\_, in this State], wherein this plaintiff was plaintiff, and one M. N. was defendant [or otherwise], the plaintiff recovered a judgment duly given by said court, against the said M. N., for \_\_\_\_\_ dollars [or, where the judgment was in a justice's court, duly given by said justice against said M. N. for \_\_\_\_\_ dollars, which judgment was thereafter duly docketed in the office of the clerk of the county of \_\_\_\_\_ ].

plaint in an action against an officer levying upon goods exempt from execution, to allege that the goods were exempt. It is sufficient for the plaintiff to allege an unlawful taking. If the defendant had any authority to take the plaintiff's property, he is bound to set it up in the pleadings, and prove it as matter of defence. *Stevens v. Somerindyke*, 4 *E. D. Smith*, 418. Compare 6 *Clarke (Iowa)*, 374.

For the form of a complaint against a sheriff for neglect to assign over prisoners, see *French v. Willett*, 10 *Abbotts' Pr.*, 99.

For the form of a complaint against

a constable, for refusing to receive a bond and deliver goods claimed by a third party, see *Kamena v. Wanner*, 6 *Abbotts' Pr.*, 193.

(b) For neglect to return an execution the plaintiff may proceed by attachment, or may sue for the neglect. *Burk v. Campbell*, 15 *Johns.*, 456; *Bank of Rome v. Curtiss*, 1 *Hill*, 275.

(c) Proof that the defendant acted as sheriff is enough, without proving his official appointment or election. *Potter v. Luther*, 3 *Johns.*, 431; *Dean v. Gridley*, 10 *Wend.*, 255; and see *Hall v. Luther*, 13 *Id.*, 491. Compare *Curtis v. Fay*, 37 *Barb.*, 64.

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 Actions against Sheriffs.
 

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III. That on the                    day of                    , 18    , an execution against the property of said M. N. was duly issued by this plaintiff on said judgment, and directed and then delivered to the defendant, as sheriff of the county of                    , of which execution the following is a copy: [*copy of the execution and indorsement*], [*or, state its substance,—e. g., thus, whereby said defendant was directed to satisfy said judgment out of the personal property of said M. N., in said                    county, or if sufficient personal property could not be found, out of the real property belonging to him on the day when said judgment was docketed in said                    county, or at any time thereafter, and return said execution to                    within sixty days after the receipt thereof by him*]. (*d*)

IV. That although [more than] sixty days elapsed after delivery of said execution to the defendant, and before the commencement of this action, yet he has, in violation of his duty as such sheriff, failed to return the same, (*e*) to the damage of the plaintiff                    dollars. (*f*)

### 517. *For Neglecting to Levy.*

I., II., and III. [*As in preceding form.*]

IV. That although at the time of the said delivery of the execution to the defendant, there was within said county [per-

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(*d*) If the execution was against the person, state it accordingly. It is not, however, necessary to set forth the several steps in the action on which the mere regularity of the process depends. It is enough, after showing jurisdiction to issue the process, to allege that it was duly issued. *French v. Willett*, 4 *Bosw.*, 649; S. C., 10 *Abbotts' Pr.*, 99.

(*e*) The action lies against the sheriff for not returning an execution, although he has not been ruled to do so. *Burk v. Campbell*, 15 *Johns.*, 456; and see *Bank of Rome v. Curtiss*, 1 *Hill*, 275; *Pardee v. Robertson*, 6 *Id.*, 550; *Stevens v. Rowe*, 3 *Den.*, 327. A request to return is not necessary to be proved. *Cor-*

*ning v. Southland*, 3 *Hill*, 552; *Fisher v. Pond*, 2 *Id.*, 338; *Howden v. Stanish*, 6 *C. B.*, 504; S. C., 60 *Eng. Com. L. R.*, 503.

(*f*) In an action for neglecting to return an execution, it is not essential to aver any special damage. The amount due on the judgment is *prima facie* the measure of damages; and the burden of proof is with the defendant to show that the whole amount could not with due diligence be collected. *Ledyard v. Jones*, 7 *N. Y.* (3 *Seld.*), 550; affirming S. C., 4 *Sandf.*, 67; *Pardee v. Robertson*, 6 *Hill*, 550; *Bank of Rome v. Curtiss*, 1 *Id.*, 275, and see *Bacon v. Cropsey*, 7 *N. Y.* (3 *Seld.*), 195.



## For Neglect to Pay Over.

sonal] property belonging to the defendant, to wit, [*designate it briefly*], out of which the defendant might have satisfied the execution [of which property he then and there had notice]; (g) nevertheless, in violation of his duty as such sheriff, he failed to levy (h) the moneys or any part thereof, as by said execution he was required to do, to the damage of the plaintiff dollars.

518. *For Neglecting to Pay Over Moneys Collected on Execution.* (i)

I. That at the times hereinafter mentioned, the defendant was the sheriff of the county of \_\_\_\_\_, in this State.

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, an execution, then duly issued, in form and effect as required by law, against the property [*or, the person*] of one M. N., and in favor of the plaintiff, upon a judgment for the sum of \_\_\_\_\_ dollars theretofore duly given in favor of the plaintiff against said M. N., in the Court of \_\_\_\_\_, (j) was by the plaintiff directed and delivered to the defendant as such sheriff.

(g) As to the necessity of averring notice, see Form 368 and notes, *ante*, p. 284.

(h) A declaration in case against the sheriff alleged, that although defendant could have levied, of goods of the execution-debtor within his bailiwick, the moneys indorsed on the writ, yet defendant, disregarding his duty, did not levy of the said goods, the moneys, or any part thereof; and that defendant, further disregarding his duty, falsely returned, &c.—*Held*, that the first allegation sufficiently charged a breach of duty, and applied to improper conduct of the sheriff in the sale of goods, as well as to negligence in omitting to levy; and that the declaration was good without stating special damage. *Mullett v. Challis*, 16 Q. B., 239; 20 Law J. R. (N. S.), Q. B., 161; 15 Jur., 243.

(i) An action on the case or an action of assumpsit for money had and received, at the option of the plaintiff, might be maintained against the sheriff

for money collected by him on execution, and not paid over. *Dygart ads. Crane*, 1 Wend., 534; *Shepard v. Hoit*, 7 Hill, 198. But to render the deputy or under-sheriff liable to the creditor, in such a case, an express promise must be shown. *Tuttle v. Love*, 7 Johns., 470; *Paddock v. Cameron*, 8 Cow., 212; and see *Colvin v. Holbrook*, 2 N. Y. (2 Comst.), 126; affirming S. C., 3 Barb., 475.

(j) It seems that in an action for not paying over, it is enough to show the delivery of the execution without proving the judgment. *Elliot v. Cronk*, 13 Wend., 35; and see 1 Cow. Tr., 322.

And it is no defence to the sheriff to show that the process was voidable. *Walden v. Davison*, 15 Wend., 575; *Parmelee v. Hitchcock*, 12 Id., 96; *Bacon v. Cropsey*, 7 N. Y. (3 Seld.), 195; and see *Ontario Bank v. Hallett*, 8 Cow., 192; *Grosvenor v. Hunt*, 11 How. Pr., 355; *Ginochio v. Orser*, 1 Abbotts' Pr., 433.

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 Actions against Sheriffs.
 

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III. That the defendant thereafter, as such sheriff, collected and received upon said execution, to the use of the plaintiff, the sum of            dollars, besides his lawful fees and poundage.

IV. That although [more than] sixty days elapsed, after the delivery of said execution to the defendant, before this action, yet he has, in violation of his duty as such sheriff, failed to pay over to the plaintiff the amount so collected. (*k*)

519. *For a False Return.* (*l*)

I. That at the time of the issuing and return of the execution hereinafter mentioned, the defendant was the sheriff of the county of           , in this State.

II. That on the            day of           , 18           , this plaintiff recovered a judgment duly given by the Supreme Court, in and for the county of            [*or other court*], against one M. N., for            dollars (*m*) [*or as in Form 516*].

III. That on the            day of           , 18           , an execution against the property of said M. N. [*or, if the judgment was against several joint-debtors on service of part only, say, against the joint property of M. N. and O. P., and against the separate property of O. P.*], was duly issued upon said judgment by the plaintiff, and directed and then delivered to the defendant as such sheriff, of which execution, and the indorsement thereon, the following is a copy: [*or, whereby the defendant was required, &c., stating effect as in Form 516*].

IV. That the defendant as such sheriff, did, within sixty days thereafter, by virtue of said execution, levy on certain personal property of said M. N., within said county, of the value sufficient to satisfy said judgment [*or, said judgment in part, to wit, to the amount of            dollars*], together with the defendants' fees and poundage.

V. That notwithstanding the premises, and in violation of his duty as sheriff, he did not satisfy said judgment or any part

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(*k*) No demand on the sheriff is necessary. It is his duty to pay over without demand. *Brewster v. Van Ness*, 18 *Johns.*, 133; *Dygert v. Crane*, 1 *Wend.*, 534; and see *Shepard v. Hoit*, 7 *Hill*, 198.

(*l*) This form is sustained by *Bacon v. Cropsey*, 7 *N. Y.* (3 *Seld.*), 195.

(*m*) In an action for a false return the plaintiff must prove a valid judgment. *McDonald v. Bunn*, 3 *Den* 45.

## For Escape.

thereof; but has falsely returned upon said execution to the clerk of the county of \_\_\_\_\_, that said M. N. had not any goods or chattels within said county, whereby he could cause to be levied the amount of said judgment, or any part thereof, (n) to the damage of the plaintiff \_\_\_\_\_ dollars.

520. *For an Escape. Common Form.*

I. That at the time of the issuing of the execution and of the escape hereinafter mentioned, the defendant was the sheriff of the county of \_\_\_\_\_, in this State.

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, in an action brought in the Supreme Court of this State, in the county of \_\_\_\_\_ [or other court], by this plaintiff against one M. N. [or, by one M. N. against this plaintiff], for wrongfully converting property [or state other case authorizing arrest, see Code, § 179], this plaintiff recovered judgment, duly given by said court, against said M. N. for \_\_\_\_\_ dollars.

III. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, an execution against the property of said M. N. was duly issued by this plaintiff on said judgment, and thereafter duly returned wholly unsatisfied [if partly satisfied, add, except as to the sum of \_\_\_\_\_ dollars]. (o)

IV. That thereafter and on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, an execution against the person of the said M. N. was duly issued by this plaintiff on said judgment, and then directed and delivered to the defendant as said sheriff, whereby he was required to arrest said M. N. and to commit him to the jail of said county \_\_\_\_\_, until he should pay said judgment, or be discharged according to law. (p)

V. That thereafter the defendant, as such sheriff, arrested said M. N. and committed him to jail, (q) pursuant to said exe-

(n) The complaint should show that the return was false, and that the respect in which it was false is material. *Kidzie v. Sackrider*, 14 *Johns.*, 195; and see *Houghton v. Swarthout*, 1 *Den.*, 589.

(o) This allegation is not essential. *Hinman v. Brees*, 13 *Johns.*, 529; *Scott v. Shaw*, *Id.*, 378; *Ontario Bank v.*

*Hallett*, 8 *Cow.*, 192; *Renick v. Orser*, 4 *Bosw.*, 384; *French v. Willett*, 10 *Abbotts' Pr.*, 99; S. C., 4 *Bosw.*, 649.

(p) In an action for an escape, the indorsement upon the execution or writ need not be set out. *Jones v. Cook*, 1 *Cow.*, 309.

(q) An averment that the defendant arrested the debtor, "and had and de-

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cution; but in violation of his duty as such sheriff, has since, to wit, on the            day of           , 18   , without the consent of the plaintiff, (r) permitted said M. N. to escape (s) [*or, but since then, to wit, on the            day of           , 18   , said M. N. went and was at large without the limits and boundaries of the liberties of said jail, without the assent of the plaintiff*], (t) to the damage of the plaintiff            dollars. (u)

521. *For Escape from Custody upon an Order of Arrest.*

I. [*As in preceding form.*]

II. That on the            day of           , 18   , in an action brought in the Supreme Court of this State, in the county of            [*or other court*], by this plaintiff against one M. N. for wrongfully converting property, [*or other case authorizing arrest, see Code, § 179*], an order was duly made by           , one of the justices of said court, whereby the defendant, as such sheriff, was required to arrest the said M. N., and hold him to bail in the sum of            dollars.

III. That thereafter and on the            day of           , 18   , said order was duly delivered to the defendant, as said sheriff, to be executed.

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tained him in custody in execution," sufficiently imports that the prisoner was committed to jail, to bring the case within 2 Rev. Stat., 437, § 63,—which gives debt for an escape. *Ames v. Webbers*, 8 *Wend.*, 545.

(r) The general authority of the attorney as such, is not sufficient to authorize the sheriff in discharging the prisoner upon his consent. *Kellogg v. Gilbert*, 10 *Johns.*, 220.

(s) "Permitted" imports a voluntary escape. *Holmes v. Lansing*, 3 *Johns. Cas.*, 73; *Loosey v. Orser*, 4 *Bosw.*, 391. The old forms contain an averment that the debtor is still at large; but a return or recapture is a matter of defence, and it does not lie on the plaintiff to negative it. See 2 *Greenl. on Ev.*, § 589.

(t) This allegation brings the case

within the statute. 2 *Rev. Stat.*, 437, § 62.

(u) Except where the action is brought upon the statute (see Form 522), in case of an escape from final process, or from attachment for non-payment of costs, the measure of damages is only *prima facie* the amount of the debt. Insolvency of the debtor may exonerate the sheriff. *Ginochio v. Orser*, 1 *Abbotts' Pr.*, 433; *Potter v. Lansing*, 1 *Johns.*, 215; *Russell v. Turner*, 7 *Id.*, 189; *Rawson v. Dole*, 2 *Id.*, 454; *Thomas v. Weed*, 14 *Id.*, 255; *Littlefield v. Brown*, 1 *Wend.*, 398; *Patterson v. Westervelt*, 17 *Id.*, 543; *Fairchild v. Case*, 24 *Id.*, 381; 8 *Id.*, 545; *Hutchinson v. Brand*, 9 *N. Y. (5 Seld.)*, 208; see, also, *Daguerre v. Orser*, 3 *Abbotts' Pr.*, 86; and compare note (f). *supra*, and cases there cited.

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For Escape ;—in Debt under the Statute.

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IV. That thereafter the defendant, as such sheriff, arrested said M. N. and committed him to jail, pursuant to said order ; but in violation of his duty as such sheriff, has since, to wit, on the       day of       , 18       , without the consent of this plaintiff, permitted said M. N. to escape [*or*, but since then, to wit, on the       day of       , 18       , said M. N. went and was at large without the limits and boundaries of the liberties of said jail, without the assent of the plaintiff], to the damage of the plaintiff       dollars.

522. *For Escape from Execution or Attachment for Non-payment of Costs ; Seeking to Recover the Amount of the Debt, &c., as in an Action of Debt, under the Statute. (v)*

*As in Form 520, omitting the words, “to the plaintiff’s damage       dollars,” at the end, and substituting for the usual demand of judgment, the following:*

Wherefore the plaintiff demands judgment against the defendant according to the statute, for the debt [*or*, damages, *or*, sum of money], for which such prisoner was committed ; to wit,       dollars, with interest from, &c. (*v*)

(*v*) In the absence of statute the sheriff may be held liable for an escape only by an action in the nature of an action on the case in which the plaintiff can only recover his actual damage. By 2 Rev. Stat., 437, he was made liable in the case of escape from execution in civil action, or attachment for costs, to an action of debt, in which the plaintiff might recover the whole of his judgment against the prisoner. This statute is not abrogated by the Code. *Barnes v. Willett*, 12 *Abbotts’ Pr.*, 448 ; S. C., 35 *Barb.*, 514. It is safer to show in the complaint that the action is founded on the statute ; but another form than that above may show it equally well. Thus, it is enough to conclude by adding, “That, thereupon,

the judgment remaining wholly unpaid, the defendant [*sheriff*] became indebted to the plaintiffs in the sum of       dollars, the amount of said judgment.” *Barnes v. Willett*, 11 *Abbotts’ Pr.*, 225 ; S. C., 19 *How. Pr.*, 564. So in *Renick v. Orser*, 4 *Bosw.*, 384, and *McCreery v. Willett*, *Id.*, 643, claiming the amount of the debt, with interest and costs, without using the word “damages,” was held equivalent to a declaration in debt under the statute.

(*v*) It seems that if the plaintiff would recover interest upon his judgment against the debtor he must not sue on the statute, but for damages, as in Form 520. *Renick v. Orser*, 4 *Bosw.*, 384.

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 Actions against Sheriffs.
 

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523. *Upon Sheriff's Liability as Bail, under the Code of Procedure.* (x)

I. That at the times hereinafter named, the plaintiffs were co partners, doing business in the city of New York, under the firm-name of M. & D.

II. That the defendant was sheriff of the county of \_\_\_\_\_, on and from the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, to the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_.

III. That an order of arrest, of which a copy is annexed as part of this complaint, marked Schedule B., was duly made by \_\_\_\_\_, at that time a justice of the Supreme Court of this State, and delivered to the said defendant, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, in an action in said court, wherein these plaintiffs were plaintiffs, and one G. H. was defendant, requiring the defendant in this action to arrest and hold to bail, in the sum of \_\_\_\_\_ dollars, the said G. H.

IV. That thereupon the defendant arrested said G. H., on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, and thereafter permitted him to escape from his custody; and on or about the \_\_\_\_\_ day of \_\_\_\_\_, the said defendant delivered to the plaintiffs' attorneys, by whom the order of arrest was subscribed or indorsed, a paper purporting to be a certified copy of an undertaking of the bail taken by him upon the discharge of the said G. H. from arrest, a copy of which is annexed as a part of this complaint, and marked Schedule A.; but the same was not executed by two or more sufficient bail, and did not state their places of residence and occupations, according to law; and that on the next day—that is to say, on or about the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_,—a notice was duly served on the defendant, that the plaintiffs did not accept the said bail, but after the receipt of the said notice

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(x) This complaint is sustained by *Metcalf v. Stryker*, 10 *Abbotts' Pr.*, 13; S. C., 31 *Barb.*, 62. A distinction is to be noticed between the action against the sheriff for an *escape* and an action founded on section 201 of the Code, which declares that in case defendant escapes after arrest, the sheriff shall be liable as bail, &c. The two actions are governed by different rules, both in re-

spect to the liability of the officer and in respect to the limitation of time within which they may respectively be brought, &c. And it is held that in an action brought in form for an escape, the plaintiff ought not to be allowed to amend his complaint so as to found the action upon section 201. See *Daguerre v. Orser*, 3 *Abbotts' Pr.*, 86, where the distinction is discussed.

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 Against Sheriff as Bail.
 

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by the defendant, neither the defendant nor the said G. H. gave to the plaintiffs or their attorneys, by whom the said order or arrest was subscribed, notice of the justification of the same, or of other bail, before a judge of the court or a county judge, at any specified time or place, nor any justification, or other notice of justification, as required by law.

V. That on the            day of            , 18    , the plaintiffs obtained judgment in said action against said G. H. for            dollars, and on the            day of            , 18    , caused [to be filed a transcript of said judgment in the office of the clerk of            county, and] an execution to be duly issued to the then sheriff of said county, upon said judgment, against the property of said G. H., which was thereafter returned by said sheriff, wholly unsatisfied; and, thereafter, and on the            day of            , 18    , an execution against the person of said G. H. was duly issued to the said sheriff, which has also been returned by the said sheriff, "defendant not found."

VI. That the said judgment has not been paid, nor any part thereof; but the same is still unpaid, and in full force.

VII. That the amount of said judgment and interest was duly demanded of said defendant, before the commencement of this action, and the payment of the same refused.

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 SECTION XVII.

## COMPLAINTS IN ACTIONS FOR DECEIT.

[In an action to recover damages for false and fraudulent representations where there is no warranty, the facts that the representations were *false*, that defendant *knew* them to be false, and that he made them with intent to *defraud* the plaintiff, are all essential facts constitutive of the cause of action. They must be stated in the complaint; and they should be stated with clearness and certainty. (a)]

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(a) It was held in *Sharp v. Mayor*, &c., of N. Y., 25 *How. Pr.*, 389, that if the complaint states the representations that were made,—stating them as representations of fact, made by the defendants of their own knowledge, not as expressions of opinion or belief, that those representations were false, that the plaintiff relied on them, and that he suffered damage thereby,—this is sufficient; and it is not indispensable that the complaint should in terms allege fraud; and its omission does not substantially vary the cause of action;

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Actions for Damages caused by Deceit or Fraud.

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If there was a warranty, and the plaintiff would still ground his action on deceit or fraud in the sale, the deceit or fraud must be substantially alleged; (*b*) but in this case it is not essential to allege that the defendant knew his representations were false. (*c*)

The complaint must show what the representations were. (*d*) Alleging that the defendant made one or other of several representations is objectionable. (*e*)

It must be averred that the false representation was made, or the truth was suppressed, with intent to deceive and defraud. (*f*) But a complaint which substantially, although not in direct and technical language, alleges this, is sufficient. (*g*)

So, too, it should appear, except where the action is on a false warranty, that the defendant knew that his representations were false; but the allegation that he falsely and fraudulently represented, may well be deemed as equivalent to alleging that he knew the falsity of the representations. (*h*)

It must be alleged, also, that the representations were made to the plaintiff, or were intended to influence him or the public, or a class of persons of which he was one, and so came to him, (*i*) and that he relied upon them to his injury.]

524. For fraudulently obtaining goods on credit.....	p. 431
525. For fraudulently obtaining credit for another person.....	431
526. For fraudulently selling a tract of land for more than it was.....	432
527. For fraudulently misrepresenting value of good-will of business sold ..	433
528. Against seller of chattels, for fraudulently representing them to be his property.....	434
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and if it were material, the complaint could be amended on the trial by inserting the allegation, and a judgment should not be reversed, although the amendment was not actually made.

(*b*) *Evertson v. Miles*, 6 *Johns.*, 138.

(*c*) *Holman v. Dord*, 12 *Barb.*, 336.

(*d*) *Wells v. Jewett*, 11 *How. Pr.*, 242. The falsity shown must be falsity at the time when the representations were made. *Bell v. Mali*, *Id.*, 254.

(*e*) Such a complaint is obnoxious to a motion to make more definite and certain. *Corbin v. George*, 2 *Abbotts' Pr.*, 465.

(*f*) *Addington v. Allen*, 11 *Wend.*, 374; reversing *S. C.*, 7 *Id.*, 9; *Wells v. Jewett*, 11 *How. Pr.*, 242.

(*g*) *Zabriskie v. Smith*, 13 *N. Y. (3 Kern.)*, 322; *Cazeaux v. Mali*, 25 *Barb.*, 578.

(*h*) The contrary was held in *Mabey*

*v. Adams*, 3 *Bosw.*, 346; but the point does not seem to have received much consideration in that case, and the Court of Appeals and the Court of Errors have both held that in alleging deceit, the averment that the defendant falsely and fraudulently represented, &c., is sufficient after verdict, as an allegation of his knowledge that his representations were false. *Thomas v. Beebe*, 25 *N. Y.*, 244; *Bayard v. Malcolm*, 2 *Johns.*, 550; reversing *S. C.*, 1 *Id.*, 453. And in both these cases the opinion was clearly expressed that the allegation was sufficient before verdict. Compare *Evertson v. Miles*, 6 *Johns.*, 138; *Panton v. Holland*, 17 *Id.*, 92; *Cross v. Garnett*, 3 *Mod.*, 269, *note*. Both allegations are inserted in the forms in this section, in deference to the conflict in these cases.

(*i*) *Cazeaux v. Mali*, 25 *Barb.*, 578



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For Fraud in Obtaining Credit.

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530. For fraudulently misrepresenting value of stock in a corporation, agreed to be taken in payment for services. . . . . p. 435
531. Against the directors of an insurance company, to hold them personally liable on a policy, on the ground of their false representations of the amount of capital, which induced plaintiff to insure. . . . . 436

524. *For Fraudulently Obtaining Goods on Credit.*

I. That on the                day of                , 18    , at                , the defendant, with intent to deceive and defraud the plaintiff by inducing the plaintiff to sell goods for him, falsely and fraudulently represented to the plaintiff that he was solvent, and worth                dollars over all his liabilities [*or otherwise, as the representations were*].

II. That the plaintiff, relying on said representations, was thereby induced to sell [and deliver] to him [*briefly designate the goods*], of the value of                dollars.

III. That the said representations were false in that [*stating what respect*], and were then known by the defendant to be so.

IV. That no part of the price thereof has been paid [*and, if the goods were not delivered*], and that the plaintiff in preparing and shipping the said goods, and in stopping them in transit, expended                dollars], to his damage                dollars.

525. *For Fraudulently Obtaining Credit for Another Person. (j)*

I. That on the                day of                , 18    , at                , the defendant, with intent to deceive and defraud the plaintiff, (*k*) falsely and fraudulently represented to him (*l*) that one M. N.

(*j*) See the principles on which this action is based, stated, and the authorities which support it collated, in the opinion of Senator Edmonds in *Addington v. Allen*, 11 *Wend.*, 374, 402.

In *Waller v. Rasken* (12 *How. Pr.*, 28), it was held that a cause of action for deceit, in falsely representing a third person as worthy of credit, cannot be joined with a cause of action on a guaranty of the amount of his purchase; but, perhaps, this view defers more to the old forms of action than to the Code. See *ante*, p. 384, note (*m*), and see *Robinson v. Flint*, 7 *Abbotts' Pr.*, 393, note.

(*k*) It is not necessary in actions of this description to show that defendant reaped any advantage from his false representations. Deceit on the part of the defendant, and damage resulting therefrom to the plaintiff, are a cause of action, although without benefit to the defendant. *White v. Merritt*, 7 *N. Y. (3 Seld.)*, 352: The action will lie whenever there has been the assertion of a falsehood, with a fraudulent design, as to a fact, when a direct and positive injury arises from such assertion. *Bac. Abr.*, tit. *Action on the Case*, F. *Benton v. Pratt*, 2 *Wend.*, 385.

(*l*) As to the proper mode of plead.

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Actions for Damages caused by Deceit or Fraud.

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was in good credit and safe to be trusted, and worth the sum of            dollars over and above his debts and liabilities [*or otherwise, as the fraudulent representations were*]. (m)

II. That the plaintiff relying on said representations, sold and delivered [*briefly designate the goods*], of the value of           , to said M. N. for a credit of            months; but although said term has expired, said M. N. has neglected and refused to pay for said goods.

III. That in truth, and as defendant then well knew, (n) said M. N. was, at the time of such representations, insolvent, and not in good credit, nor safe to be trusted, nor worth any thing over and above his debts and liabilities.

IV. That by means of said premises the plaintiff has wholly lost said goods, and the value thereof, to his damage            dollars.

526. *For Fraudulently Selling a Tract of Land for More than it Was.* (o)

I. That the plaintiff, on the            day of           , 18           , bargained with the defendant to buy of him a piece of land of the said defendant, situate in [*very briefly designate it*], which said piece of land the defendant then, with intent to deceive and defraud the plaintiff, falsely and fraudulently represented to him to contain            acres, when the defendant then well knew that it contained only            acres.

II. That the plaintiff, then confiding in the truth of said representations, and supposing said piece of land to contain the said quantity of            acres, agreed to pay for said land, and did then pay therefor to the said defendant the sum of            dollars. (p)

III. That in truth the said piece of land did not contain            acres, but only            acres, whereby the said plaintiff has sustained damages, to the amount of            dollars.

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ing in an action against defendant for fraudulently inducing a third person to represent an insolvent as worthy of credit, whereby plaintiff was induced to sell to such insolvent, see *Addington v. Allen*, 7 *Wend.*, 9; S. C., 11 *Id.*, 374.

(m) The representation must be stated,

to enable the court to judge whether it was sufficient to mislead. *Addington v. Allen*, 11 *Wend.*, 374, 386; *Wells v. Jewett*, 6 *How. Pr.*, 242.

(n) The clause "as defendant then well knew;" may, perhaps, be unnecessary, see note (e), *supra*.

## For Deceit in Sale.

527. *For Fraudulently Misrepresenting Value of Good-will of Business Sold.* (q)

I. That on the            day of           , 18   , at           , the defendant being engaged in business as           , and having offered to sell out the [stock, fixtures, and] good-will of his said business to the plaintiff, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that the said business, as theretofore conducted by defendant, was a profitable business, and that the net profits thereof, realized by the defendant during the year ending the            day of           ; 18   , had exceeded the sum of            dollars [*or otherwise, as the representations were*].

II. That this plaintiff, relying on said representations, purchased of defendant the [stock, fixtures, and] good-will of defendant, and paid him therefor the sum of            dollars.

III. That in truth, and as defendant then well knew, said representations were false, and said business was not and never had been a profitable business, and the defendant had not realized any profits whatever from the same during the year ending the            day of           , 18   , [*or otherwise state specifically the particulars in which the representations were false.*]

IV. That by reason of the premises, this plaintiff was misled, to his damage            dollars. (r)

(o) Fraudulent representations, or deceit, accompanied by damage, constitute a good ground of action in respect to a sale of lands as much as in respect to personal property. *Crandall v. Bryan*, 5 *Abbotts' Pr.*, 162; *Clark v. Baird*, 9 *N. Y. (5 Seld.)*, 183; and see *Van De Sande v. Hall*, 13 *How. Pr.*, 458.

This form is, in substance, from *Nash's Pl. & Pr.*, 237.

(p) When the fraudulent representations relate to the quantity of the land, it is immaterial whether the sale is in gross or by the acre. *Thomas v. Beebe*, 25 *N. Y.*, 244.

(q) A cause of action for false representations in inducing the plaintiff to enter into a contract, and a cause of action for a breach of the same contract, may be joined. "Transaction" means the whole proceedings, commencing with the negotiation and ending with the performance of the contract, where the matter in controversy arises out of a contract. *Robinson v. Flint*, 7 *Abbotts' Pr.*, 393, *note*.

(r) Particular matters of loss or expense which the plaintiff seeks to recover, should be specially stated.

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 Actions for Damages caused by Deceit or Fraud.
 

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 528. *Against Seller of Chattels, for Fraudulently Representing them to be his Property. (s)*

I. That on the                    day of                   , 18                   , at                   , the defendant having offered to sell to the plaintiff a certain horse, did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that said horse was the property of defendant [*or otherwise, as the representations were*].

II. That the plaintiff, relying on said representations, purchased said horse of the defendant, and paid him therefor the sum of                    dollars. (*t*)

III. That, in truth, and as defendant then well knew, said representations were false, and said horse was not the property of the defendant, but was the property of one M. N. [*or otherwise state specifically the particulars in which the representations were false*].

IV. That thereafter, the said M. N. sued this plaintiff in the                    Court [*or, before Q. R., a justice of the peace for the town of*], to recover the value of said horse; and although this plaintiff [employed one O. P., a competent attorney of the Supreme Court of this State, to defend, and] used due diligence in the defence of said suit, (*u*) the said M. N. recovered a judgment (*v*) against the plaintiff [duly given by said justice] for the sum of                    dollars, which this plaintiff has since paid

(*s*) Compare with this form, the form of complaint already given for a False Warranty of title; Form 478, *ante*, p. 394.

A complaint averring "that defendant falsely pretended to be the owner" of a certain chattel, and "that he fraudulently sold it to the plaintiff, whereby he became liable," fixes the gravamen of the action as fraud. 2 *Johns.*, 560; 13 *Id.*, 224. *Edick v. Crim*, 10 *Barb.*, 445; and see *McGovern v. Payn*, 32 *Id.*, 83. That actions of this description are founded on the *fraud*, not on the contract, see *McDuffie v. Beddoe*, 7 *Hill*, 578.

(*t*) The averment of price paid goes only to the amount of damages. The

action may be maintained, though there was no consideration. *Barney v. Dewey*, 13 *Johns.*, 224; *Corwin v. Davison*, 9 *Cow.*, 22.

(*u*) Or, state notice to defendant of the pendency of the suit, as in Form 478, *ante*, p. 394; and see *Blasdale v. Babcock*, 1 *Johns.*, 517.

An allegation that the true owner had recovered against the plaintiff on the ground that defendant was not the owner, is proper; and an allegation that defendant was a witness at the trial of the owner's action, is equivalent to an averment of notice. *Barney v. Dewey*, 13 *Johns.*, 224; *Corwin v. Davison*, 9 *Cow.*, 22.

(*v*) The fact of recovery by the right-

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For Deceit in Delivery.    In Selling Stock.

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[or, which judgment still remains outstanding and in full force].

V. That by reason of the premises, this plaintiff has been misled, to his damage                      dollars.

529. *The Same, for Fraudulently Delivering Smaller Quantity than Agreed For.* (v)

I. That the plaintiff, on the                      day of                      , 18    , at                      , bought of the defendant, and the defendant sold and agreed to deliver to the plaintiff [*briefly designate the merchandise and price,—e. g., thus,—*ten tons of coal, for the price of                      dollars per ton].

II. That the defendant afterwards, and on the                      day of                      , 18    , intending to defraud the plaintiff, fraudulently and deceitfully delivered to him only [nine tons of coal] as and for the said quantity of [ten tons], so bargained for and sold; and pretending it so to be, though then well knowing that the [coal] so delivered did not contain the quantity bargained for and sold, but only [nine tons], to the damage of the plaintiff                      dollars.

530. *For Fraudulently Misrepresenting Value of Stock in a Corporation, Agreed to be Taken in Payment for Services.* (x)

I. That on the                      day of                      , 18    , at                      , the defendant having offered to the plaintiff that he would assign and transfer to him                      shares of the par value of                      dollars each, of the capital stock of the M. N. company, a corporation, incorporated under the laws of                      , and doing business in                      , upon consideration that the plaintiff should render services [by himself and his servants] in                      [*state briefly the nature of the services agreed to be rendered*], did, with intent to deceive and defraud the plaintiff, falsely and fraudulently represent to him that said stock was of the market value of                      dollars, and that defendant had paid all charges, calls, and assessments laid or to be laid upon said shares by said company

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ful owner against the buyer, is conclusive against the fraudulent seller. *Nash's Pl. & Pr.*, 237; and see, 3 *Stark.*, 23.

*Barney v. Dewey*, 13 *Johns.*, 224. (x) See *Atwill v. Le Roy*, 4 *Abbotts'*

(w) This form is, in substance, from *Pr.*, 438

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Actions for Damages caused by Deceit or Fraud.

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or the trustees or directors thereof [*or otherwise, as the false representations were*].

II. That the plaintiff, relying upon said representations, then and there agreed with the defendant to render [by himself and his servants] all necessary services that should be required by the defendant in said [*&c.*], to the value, at the market prices for such services, of                      dollars [*or otherwise state fully the nature and the value of the services agreed to be rendered*]; and thereafter proceeded to, and did render [and cause to be rendered] said services [*state facts showing how far the contract was performed by plaintiff*].

III. That, in truth, and as defendant then well knew, the said stock was not then of the market value of                      dollars; but, on the contrary, the said company was then insolvent, and the stock worthless and unsalable in the market; and the defendant had not paid all charges, calls, and assessments laid upon said shares; but, on the contrary, a special assessment of                      per cent. on the par value of said shares had been theretofore duly imposed upon them by the directors of said company, which assessment had not been paid by defendant, but then remained [and still remains] a charge upon said shares [*or otherwise state specifically the particulars in which the representations were false.*]

IV. That by reason of the premises, the plaintiff has been misled, to his damage                      dollars.

531. *Against the Directors of an Insurance Company, to hold them Personally Liable on a Policy, on the ground of their False Representations of the Amount of Capital which Induced Plaintiff to Insure.* (y)

I. That these plaintiffs are, and at all the various times hereinafter mentioned were, partners in business, as                      , in                      , under the firm-name of A. B. & Co.

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(y) This form is sustained by *Harper v. Chamberlain*, 11 *Abbotts' Pr.*, 234. For a complaint for fraudulent representations as to the value of stock, whereby the plaintiff was induced to purchase it, see *Newbery v. Garland*, 31 *Barb.*, 121; *Morse v. Swits*, 19 *How.*

*Pr.*, 275; *Mabey v. Adams*, 3 *Bosw.*, 346.

In an action against promoters of a Bubble Company, the same facts must concur as in an action for the false representation of the credit of a buyer. The pleading must state what the false

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 Against Directors of Bubble Company.
 

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II. That in the year 18 , a company known as [*name of corporation*], was organized in this State for the purpose, among other things, of making insurance upon [vessels, freights, goods, wares, merchandise, specie, jewels, profits, commissions, bank-notes, bills of exchange, and other evidences of debt, bottomry and respondentia interests, and to make all and every insurance appertaining to or connected with marine risks, and risks of transportation and navigation; and to make insurance on dwelling-houses, stores, and all kinds of buildings, and upon household furniture, merchandise, and other property, against loss or damage by fire, and the risks of navigation and transportation].

III. That said company was pretended to be organized under the provisions of an act of the Legislature of this State, passed April 10, 1849, entitled "An Act to provide for the Incorporation of Insurance Companies."

IV. That, by the pretended charter of said company, it was provided that the business of said company should be conducted upon the plan of mutual insurance; and it was also provided that the capital of said company should be        dollars; and it was also provided that the directors of said company might unite a cash capital of not less than        , nor more than        dollars, as an additional security to the insured, above the fund of        dollars, also mentioned in said charter; and it was also provided that the principal office of the company should be located in the city of N. Y.

V. That upon or after the organization of said company, and prior to the month of        , 18 , the defendants, and each of them, were chosen trustees or directors of said company, and accepted and entered upon office as such; and the defendants, and each of them, were, during said [*month*], and before and afterwards, trustees or directors of said company.

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representation was; it must have been false, and so known to be to the defendant, and made with the intent and with the effect of deceiving the plaintiff, and must have caused loss to him. It is not essential that the representation should be addressed directly to the plaintiff. If it were made with the

intent of influencing every one to whom it might be communicated, or who might read or hear of it, the latter class of persons would be in the same position as those to whom it was directly communicated; but they must have come to a knowledge of it before their purchase. *Cazeaux v. Mali*, 25 Barb., 578.

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Actions for Damages caused by Deceit or Fraud.

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VI. That the defendants, as such directors or trustees of said company, fraudulently, and with the intent to induce these plaintiffs and others to make insurances with the said company, and pay them premiums for such insurances, did, at many times prior to, and during the first week of said [month], falsely publish, advertise, aver, and represent to the public at large, and to these plaintiffs, and to the confidential advisers of these plaintiffs, that the capital of said company was [*a sum largely exceeding the actual capital*]; and that said company was possessed of a paid-up capital of said last-mentioned sum; and that said company was solvent and responsible, and able to pay any losses to the amount of said last-mentioned sum; and they did fraudulently, and with like intent, prepare, and publish, and exhibit to these plaintiffs, and the confidential advisers of these plaintiffs, a form of policy containing a statement that the capital of said company was said last-mentioned sum; whereas the fact was, and these defendants well knew, that said company had never raised, and never were possessed of a capital of said last-mentioned sum in any form; and that they had never raised, and never were possessed of any cash capital exceeding                    dollars; and that the said company never did raise a capital in any form of the value of even                    dollars.

VII. That these plaintiffs, confiding in the representations aforesaid made to them by the defendants, and confiding in the general reputation of said company, produced by the representations aforesaid made by defendants to the public at large, and being further advised thereto by the confidential advisers of these plaintiffs, who were misled by the representations aforesaid made to them by the defendants, and believing, in consequence of the premises, that the said company was possessed of an actual capital of                    dollars, paid in or secured in some or the ways prescribed by the provisions of the act of 1849, hereinbefore referred to, were induced to enter into a contract with said company for an insurance, as hereinafter stated, upon the material, stock, fixtures, and other property of these plaintiffs, used by them in their business, for one year from the day of                   , 18   ; and these plaintiffs, confiding and believing as aforesaid, were induced by the premises to pay, and on or about the                    day of                   , 18   , did pay to the said company, and to the defendants as directors or trustees thereof, the



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Against Directors of Bubble Company.

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sum of                dollars as premium upon such insurance ; and were induced by the premises to make said insurance with said company, instead of making it with other companies, of which there then were a great number, solvent, responsible, and willing to make such insurance on the property described in said policy.

VIII. That the said company did, on the                day of                , 18                , execute and deliver to these plaintiffs their policy of insurance, a true copy whereof is hereto annexed, marked Exhibit A, whereby the said company, in consideration of                dollars, to them paid by these plaintiffs, the receipt whereof was thereby acknowledged, did insure these plaintiffs against loss or damage by fire, to the amount of                dollars, on their [printing and book materials, stock, paper, stereotype plates, fixtures, printed books, and steam-engine and machinery], contained in the premises in the city of N. Y., described in said policy.

IX. That on the                day of                , 18                , the said [*insured property*] described in said policy of insurance, were by misfortune, and without fraud or evil practice, damaged, consumed, and lost by fire, not happening by means of any invasion, insurrection, riot, or civil commotion, or any military or usurped power ; and that, by the said fire, the said insured sustained loss and damage, in and by the consuming, damage, loss, and destruction of said property, to the amount of                dollars, estimating the said loss at the true and actual value of the property at the time of the happening of said fire.

X. That, at the time of said fire, there were other insurances effected by these plaintiffs, as permitted by said policy, on the same property, to the aggregate amount of                dollars only.

XI. That, at the time of making said insurance, and from then until the fire above mentioned, these plaintiffs had an interest in the said property insured as the owners thereof, and they were, and now are, the lawful owners and holders of the claim arising upon said policy and loss against the said company.

XII. That these plaintiffs duly fulfilled all the conditions of said policy of insurance upon their part, and did forthwith, after the said loss and damage by fire, give notice thereof to the said company, and did, as soon thereafter as possible, and

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 Actions for Damages caused by Negligence.
 

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on the            day of           , 18   , deliver to said company a particular statement of said loss and damage, subscribed by A. B., one of these plaintiffs, and duly verified by his oath; and these plaintiffs, on the            day of           , 18   , and at divers other times, duly demanded from said company payment of the sum of            dollars and interest, due to them upon said policy by reason of said loss.

XIII. That said company have hitherto always neglected and refused to pay said loss; and these plaintiffs brought an action in the            Court of            against said company, to recover upon said policy for their loss sustained as aforesaid, and were put to great expense therein, and on the            day of           , 18   , recovered judgment therein for the full amount of their claim, and interest, and costs, to wit,            dollars, and caused execution to be issued thereon; which execution was, on the            day of           , 18   , returned wholly unsatisfied.

XIV. That, by reason of the premises, these defendants have sustained great damage, to wit,            dollars.

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 SECTION XVIII.

## COMPLAINTS IN ACTIONS FOR NEGLIGENCE.

[The complaints in this section are for negligence not connected with contract or official duty. (a)]

Where the negligence consists in the omission of a duty, the facts which are relied on as raising the duty must be alleged. (b)

Injuries to both person and property, from one act of negligence of the defendant, constitute but one cause of action at common law, and section 167 of the Code of Procedure, which enumerates such injuries separately, does not alter the rule. (c)

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(a) Complaints in actions for neglect of a duty arising out of contract,—*e. g.*, in actions against carriers, &c., are given in the previous section. For actions, under the statute, by the personal representatives of deceased person, see section XXIV., *supra*.

(b) *City of Buffalo v. Holloway*, 7 *N. Y.* (3 *Seld.*), 493; affirming *S. C.*, 14 *Barb.*, 101; *Taylor v. Atlantic Mutual Ins. Co.*, 2 *Bosw.*, 106; *Congreve v. Morgan*, 4 *Duer*, 439; *Seymour v. Maddox*, 16 *Q. B.*, 326; *S. C.*, 71 *Eng. Com. L. R.*, 326; and see *McGinity v. Mayor*, &c., 5 *Duer*, 674.

As to the sufficiency of an allegation that it became the duty of defendant, as ship's husband, to insure, see *Gregory v. Oaksmith*, 12 *How. Pr.*, 134.

(c) *Howe v. Peckham*, 10 *Barb.*, 656; *S. C.*, 6 *How. Pr.*, 229; *Grogan v. Lindeman*, 1 *Code R.*, *N. S.*, 287.

## Analysis of the Section.

If the plaintiff would rely on several acts of negligence, as the cause of one injury, he may allege all the acts of negligence in one count, and aver that they were the cause; and if he prove upon the trial that any one of them was the cause, his complaint is sustained. (*d*)

Ordinarily, however, a general averment of negligence is sufficient to admit proof of the special circumstances constituting it. Thus in an action against a railroad company for running over a child, evidence is admissible, under such a general averment, that there were no suitable brakes or guards in front of the car where the driver was stationed. (*e*)

Degrees of negligence are matters of proof, and not of averment; and a general allegation of negligence, want of care and skill, &c., is sufficient in an action for injuries caused by such negligence, whether the defendant is liable for ordinary or only gross negligence. (*f*)

It is not necessary for the plaintiff to allege in his complaint that the injury happened without any want of ordinary care on his part; (*g*) except where the facts alleged are such as to raise a presumption of such fault in him.] (*h*)

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(*d*) *Dickens v. N. Y. Central R. R. Co.*, 389; and see *Robinson v. Wheeler*, 25 13 *How. Pr.*, 238. *N. Y.*, 252.

(*e*) *Oldfield v. N. Y. & Harlem R. R. Co.*, 14 *N. Y. (4 Kern.)*, 310. (*g*) *Johnson v. Hudson River R. R. Co.*, 5 *Duer*, 21; 20 *N. Y.*, 65; *Wolfe*

(*f*) *Nolton v. Western R. R. Co.*, 15 *N. Y.*, 444. And an averment of malice does not vitiate the pleading. *Winter-son v. Eighth Ave. R. R. Co.*, 2 *Hilt.*, 370. *v. Supervisors of Richmond*, 11 *Abbotts' Pr.*, 270; *S. C.*, 19 *How. Pr.*, 370.

(*h*) *Burdick v. Worral*, 4 *Barb.*, 596.

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532. *For Keeping a Mischievous Dog, by which Plaintiff was Bitten.*

I. That at the time hereinafter mentioned, the defendant wrongfully kept (i) a dog, well knowing him to be of ferocious and mischievous disposition, (j) and accustomed to attack and bite mankind.

(i) According to some of the authorities, the action does not necessarily draw in question the adequacy of defendant's precautions for guarding his dog. If the dog was of ferocious disposition, and accustomed to bite mankind, and defendant knew this, and plaintiff has been bitten, there is, it is held, a right of action without showing specific negligence in the custody of the dog, on the ground that the owner of such a dog should destroy him, or at least is absolutely bound to confine him safely; and if he neglects to do this, he is liable for any injury the animal may do. *Buckley v. Leonard*, 4 *Den.*, 500; 2 *Chit. Pl.*, 596. And see *Jenkins v. Turner*, 1 *Ld. Raym.*, 109; *Loomis v. Terry*, 17 *Wend.*, 496. But to maintain the action on this ground, the owner must be shown to have known that the animal was wont to do mischief of the kind suffered by plaintiff; and the duty of destroying or of absolutely confining the animal, seems to arise only where it is of a disposition dangerous to the lives or safety of human beings. See *Smith v. Pelah*, 2 *Str.*, 1264.

(j) To hold the owner of domestic or other animals not necessarily inclined to commit mischief, as dogs, horses, and oxen, liable for any injury committed by them to the person or personal property, it must be alleged that he previously had notice of the animal's mischievous propensity, or that the injury was attributable to some other

neglect on his part; it being in general necessary in an action for an injury committed by such animals, to allege and prove the scienter. 1 *Chit. Pl.*, 70; *Lyke v. Van Leuven*, 4 *Den.*, 127; affirmed, 1 *N. Y.* (1 *Comst.*), 515; *Tift v. Tift*, 4 *Den.*, 175; *Vrooman v. Lawyer*, 13 *Johns.*, 339; *Auchmuty v. Ham*, 1 *Den.*, 495; *Kinion v. Davies*, *Cro. Car.*, 487; *Mason v. Keeling*, 1 *Ld. Raym.*, 606; *Beck v. Dyson*, 4 *Campb.*, 198; *Dunkle v. Kocker*, 11 *Barb.*, 387; *Fairchild v. Bentley*, 30 *Id.*, 147; and see *Buckley v. Leonard*, 4 *Den.*, 500. As to exceptions in the case of sheep killing, see 1 *Rev. Stat.*, 704, § 9.

But the common law holds a man answerable not only for his own trespass, but also for that of his domestic animals; and as it is the natural and notorious propensity of many of such animals, such as horses, oxen, sheep, swine, and the like, to rove, the owner is bound at his peril to confine them on his own land; and if they escape and commit a trespass on the lands of another, unless through defect of fences which the latter ought to repair, the owner is liable to an action of trespass *qu. cl.*, though he had no notice in fact of such propensity. And in declaring against the defendant in an action for such trespass, it is competent for the plaintiff to allege the breaking and entering his close by such animals of the defendant, and there committing particular mischief or injury to the person or property of the plaintiff; and

## For Keeping Vicious Dog.

[II. That the defendant, while he kept his dog as aforesaid, wrongfully and negligently suffered such dog to go at large, without being properly guarded or confined.] (*k*)

III. That on the            day of           , 18           , at           , the said dog, (*l*) while in the keeping of the defendant, attacked and bit the plaintiff, (*m*) and wounded him in the leg, whereby this

upon proof of the allegation, to recover as well for the damage for the unlawful entry as for the other injuries so alleged, by way of aggravation of the trespass, without alleging or proving that the defendant had notice that his animals had been accustomed to do such or similar mischief. The breaking and entering the close is, in such action, the substantive allegation, and the rest is laid as matter of aggravation only. *Van Leuven v. Lyke*, 1 *N. Y. (1 Comst.)*, 515; *Beckwith v. Shordike*, 4 *Burr.*, 2092; *Angus v. Radin*, 2 *South.*, 815; *Dolph v. Ferris*, 7 *Watts & S.*, 367; *Dunckle v. Kocker*, 11 *Barb.*, 387. And in an action for killing a dog, when the defence is that the dog was ferocious and accustomed to bite and attack mankind, it is not necessary, in order to maintain this defence, to prove that plaintiff had knowledge of the animal's propensity. *Maxwell v. Palmerton*, 21 *Wend.*, 407. An animal of this description, allowed to run at large is a public nuisance, and may be destroyed by any one. *Putnam v. Payne*, 13 *Johns.*, 312; *Hinckley v. Emerson*, 4 *Cow.*, 351; *Loomis v. Terry*, 17 *Wend.*, 496. And so of a dog which has been lately bitten by a mad dog. *Putnam v. Payne*, 13 *Johns.*, 312.

The rule is not so strong, however, where the vicious habit of the dog extends only to the worrying of other animals, or to similar mischief not affecting human safety. Compare on this subject *Hinckley v. Emerson*, 4 *Cow.*, 351; *Brill v. Flagler*, 23 *Wend.*, 354; *Wadhurst v. Damme*, *Cro. Jac.*, 45; *Barrington v. Turner*, 3 *Lev.*, 28; *Wright v. Ramscott*, 1 *Saund.*, 84;

*Brock v. Copeland*, 1 *Esp.*, 203; 1 *Rev. Stat.*, 704, §§ 9-20.

(*k*) In the form of declaration given by Mr. Chitty (2 *Chit. Pl.*, 596), no averment of negligence of defendant in the mode of guarding the dog is inserted, the action being based upon the mere keeping of the animal. But the author suggests that it may be advisable to add a count for not keeping the dog properly secured, or properly fed. As a general rule, the wrong which is the basis of plaintiff's action will be the defendant's neglect to take proper precautions for the custody of an animal which he had a right to keep if properly secured, rather than the bare keeping of an animal so ferocious that the owner was bound by law to destroy him.

We recommend, therefore, the use of paragraph II. in the complaint, though the action may be considered as maintainable without it.

(*l*) Where a mischief is done by two dogs, owned by different persons, the owners cannot be jointly sued. Each is liable for the mischief done by his own dog, but not for that done by the dog of another, unless he himself had some agency in causing the dog to do it. *Van Steenberg v. Tobias*, 17 *Wend.*, 562; *Russell v. Tomlinson*, 2 *Conn.*, 206; *Adams v. Hall*, 2 *Vt.*, 9.

(*m*) Cases in which the injury has been to an animal owned by plaintiff, instead of to the person of plaintiff, are *Lyke v. Van Leuven*, 4 *Den.*, 127; affirmed, 1 *N. Y. (1 Comst.)*, 515; *Tift v. Tift*, 4 *Den.*, 175; *Wiley v. Slater*, 22 *Barb.*, 506; *Wheeler v. Brant*, 23 *Id.*, 324; *Earl v. Van Alstine*, 8 *Id.*, 630.

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Actions for Damages caused by Negligence.

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plaintiff became lame, and so remained for                      weeks, and was thereby occasioned great pain, and prevented from going on with his business as                      , and was obliged to, and actually did expend                      dollars in endeavoring to heal himself of said wound, to his damage                      dollars.

533. *For Keeping a Dog Accustomed to Bite Sheep and Other Animals.*

I. That at the time hereinafter mentioned, the defendant wrongfully kept a dog [well knowing him to be accustomed to hunt, chase, bite, worry, and kill sheep and lambs], (*n*) which said dog, on the                      day of                      , 18                      , and on other days between that and the commencement of this action [wrongfully came upon the plaintiff's land, and there] hunted, chased, bit, and worried                      sheep and                      lambs of the plaintiff, being of the value of                      dollars.

II. That by means thereof                      of the said sheep and lambs of the plaintiff, being of the value of                      dollars, died, and became of no value to the plaintiff, and the residue of the said sheep and lambs of the said plaintiff, being also of great value, were injured, and rendered of no value to the plaintiff, to his damage                      dollars.

534. *For Keeping Open a Dangerous Hatchway, Through Which Plaintiff Fell. (o)*

I. That the defendant, at the time hereinafter mentioned [was the owner (*p*) and] had possession and control of a certain building and premises [*briefly designate them*], with the appur-

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(*n*) These words in brackets are unnecessary in an action in this State; proof of notice being dispensed with in such cases by 1 *Rev. Stat.*, 704, § 9.

(*o*) For form of a declaration for injuries sustained by going up a dangerous ladder, see 3 *Hurl. & N.*, 258.

(*p*) The action should be brought against either the owner or the actual occupant of the building; not against an intermediate lessee, except where he leased the building, suffering its dangerous condition to remain. *Daven-*

*port v. Ruckman*, 16 *Abbotts' Pr.*, 341; and see *Rosewell v. Prior*, 2 *Salk.*, 460. Where the ownership and the occupancy are united in one person (as in the supposed case above), the complaint should so state. Where they are severed, the actual occupant is *prima facie* liable, because, being in possession, he is better aware of the condition of the building and of its need of repair. The owner of leased premises is not in general liable. *Cheetham v. Hampson*, 4 *T. R.*, 318. But if the plaintiff can

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 For Keeping Dangerous Building.
 

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tenances thereto belonging, which building was then occupied by him as [*briefly designate the uses of the building, if a public resort*]. (q)

II. That said building was negligently and carelessly built, inasmuch as there was in the public hall in the second story of the same [at the time of its erection and leasing by the defendant, as well as] at the time hereinafter mentioned, an unguarded hole or hatchway through the floor, opening into the first story.

III. That the defendant, well knowing the premises, and while the owner and occupant [*or, while the occupant*] of said building, did, on the        day of       , 18       , negligently and wrongfully leave the same uncovered and unprotected, by means whereof the plaintiff, who was then lawfully in said building, (r) and in the pursuit of his business [*or, by the per-*

show that the owner was bound as against his tenant to make repairs, the action may be maintained against the owner himself, by the party injured, to avoid circuitry of action. *Payne v. Rogers*, 2 *H. Blackst.*, 349. The liability of the owners to make repairs must be shown by the complaint. A complaint against the owner of premises leased to a third person, to recover damages sustained by plaintiff by the falling of a part of the building through want of repairs, is bad, on demurrer, unless it states *facts* from which the court can say that the owner was bound to keep the premises in repair. A mere general allegation that defendant was bound to keep the premises in repair, is insufficient. *Casey v. Mann*, 5 *Abbotts' Pr.*, 91; and see *Howard v. Doolittle*, 3 *Duer*, 464.

And if it is sought to make the defendant liable on other grounds than those of negligence, such as that the place of danger is within a public street, or that a duty imposed by some municipal ordinance has been violated, those grounds should be stated in the complaint, so that issue can be taken upon them, and the defendant may

come prepared to try those issues. *Congreve v. Morgan*, 4 *Duer*, 439; 5 *Id.*, 495.

(q) If the building was a place of public resort,—*e. g.*, a railroad depot, a bank edifice, a store, or the like,—it is well so to describe it, as that fact will aid the plaintiff to make out, as he must, that his presence in the building at the time of the accident, and at that part of it where the accident happened, was lawful. Where the place was a private dwelling, the action would seem to be maintainable by one entitled to enter; both on general principles, and on the grounds on which recovery was allowed in *Bird v. Holbrook*, 4 *Bing.*, 628; S. C., 15 *Eng. Com. L. R.*, 91.

(r) An averment that plaintiff was lawfully in the building, &c., will be sufficient where the building is of a public character. But if the injury happened in a private dwelling or the like, plaintiff should, for greater certainty, aver that he was present by request of defendant, or by permission of defendant; or should otherwise show that he was rightfully present. See the form of declaration in *Casswell v. Worth*, 34 *Eng. L. & E.*, 141.

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Actions for Damages caused by Negligence.

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mission of the defendant], then and there necessarily and care<sup>s</sup> fully passing along said hall, fell through said hatchway. (s)

IV. That by means of the premises the plaintiff was greatly hurt and injured, and became sick and lame, and so remained for a long time [*or, so still remains*], and was during the space of            prevented from attending to his business as           , and was compelled to, and did expend            dollars in endeavoring to be healed of his said injuries [*or otherwise state injuries to plaintiff according to the fact*], to his damage            dollars.

*535. Against a Municipal Corporation, for Neglect of an  
Excavation in the Streets.*

I. That the defendants are a municipal corporation, duly organized under the laws of this State.

II. That, among other things, it is by their charter made their duty to keep the streets in said city in good order, and at all times properly protect any excavations made in said streets. That they accepted said charter imposing said duty, and undertook the performance thereof prior to the year 1855.

III. That a certain street in said city, known as           , was and is much travelled and used by the citizens thereof and others; so much so, that said duty of said defendants as to said street was, and became at the time hereinafter mentioned, a matter of public and general concern.

IV. That on or about the            day of           , 18   , a deep and dangerous hole or trench was excavated in said street, and suffered by the defendants, during a night on or about said day, to remain open, exposed, and without proper protection or notice to citizens and travellers against accidents.

V. That the plaintiff on the night aforesaid was lawfully travelling on said street, and, wholly unaware of danger, was accidentally, and without fault or negligence on her part, precipitated into said hole, whereby she received great bodily injury, and was made sick, sore, lame, and disabled for the space of           ; during all which time she thereby suffered great

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(s) It is a familiar rule that in actions of this description the plaintiff must be free of fault, as well as prove negligence upon the defendant. *Spencer v. Utica & Schenectady R. R. Co.*, 5 Barb., 337, and cases cited.



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For Rendering Highway Insecure.

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pain, and was thereby then and there hindered from attending to her business and domestic affairs, and has ever since remained and continued sick, sore, lame, and disabled; and was put to great expense in trying to be cured, and has suffered, and still continues to suffer great pain of body by means of such injuries, to her damage            dollars.

*536. Against a Contractor, for Leaving the Street in an Insecure State, whereby Plaintiff's Horse was Injured.*

I. That at the times hereinafter mentioned, the defendant had taken upon himself [*or*, had agreed with the trustees of the village of            to lay down pipes in and under the highway [known as            street] in           , for the purpose of lighting the said highway with gas, and to make the proper trenches for the purpose; and when such pipes were laid down, to fill up properly the said trenches, and to put and leave the said highway clear and in a reasonably secure condition.

II. That the defendant and his servants, on the            day of           , 18   , accordingly took up part of the said highway, and made trenches and holes therein, and laid down said pipes, and displaced the earth and materials of the said highway, and so carelessly and negligently filled said trenches, and left the said highway in so dangerous and improper state, that a horse of the plaintiff, of the value of            dollars, which he was then and there lawfully driving along the said highway, sunk and fell therein, and was wounded and lamed, and rendered of little or no value, to the plaintiff's damage            dollars.

*537. For Laying Rubbish in the Street, Whereby Plaintiff was Thrown Out of his Carriage.*

I. That the defendant, on or about the            day of           , 18   , wrongfully placed large quantities of building materials and earth in the public highway [known as            street] in           , and negligently left the same therein, obstructing the highway during the night-time, and without placing any light or signal there to indicate danger.

II. That in consequence of said negligence and improper conduct of the defendant, in the night-time of that day, the carriage of the plaintiff, of the value of            dollars, with the

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Actions for Damages caused by Negligence.

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plaintiff therein, then passing through said street, was accidentally driven against the said obstructions, and was thereby overturned; by means whereof the plaintiff was bruised and wounded [*conclude as in other forms*].

538. *For Flowing Water from Roof on Plaintiff's Premises.* (t)

I. That on the            day of           , 18   , the plaintiff was lawfully possessed of a dwelling-house and premises, situate in the county aforesaid, and in which the plaintiff and his family then resided.

II. That the defendant wrongfully erected a building near to the said dwelling-house of the plaintiff, in so careless and improper manner that by reason thereof, on said day, and on other times afterwards and before this action, large quantities of rainwater ran from said building upon and into the said dwelling-house and premises of the plaintiff, and the walls, ceilings, papering, and other parts thereof were thereby wet and damaged, and became less fit for habitation, to the plaintiff's damage            dollars.

539. *For Carelessly Kindling a Fire on Defendant's Land, whereby Plaintiff's Property was Burned.*

I. That on the            day of           , at           , the plaintiff was [and still is] possessed of about            of land, in           , on which there was an orchard and fences, and also a barn containing sixty tons of hay, all which the defendant well knew.

II. That the defendant on that day intentionally kindled (u) a fire on his land next adjoining to the plaintiff's, and at the distance of            from the plaintiff's said land, and so negligently watched and tended the said fire, (v) that it came into the plaintiff's said land, consumed said barn and hay, of the value of            dollars, and also forty-five rods of post and rail

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(t) This form, and the following one, are from *Swan's Pl.*, 423.

(u) If the fire began accidentally, it seems that the action will not lie. *Lansing v. Stone*, 37 *Barb.*, 15; *S. C.*, 14 *Abbotts' Pr.*, 199. The one who kindled the fire, and not the one who was

merely owner of the property where it originated, is the one liable. *Burckle v. N. Y. Dry Dock Co.*, 2 *Hall*, 151.

(v) Negligence of the defendants or his servants must be shown. *Clark v. Foot*, 8 *Johns.*, 421; *Stuart v. Hawley*, 22 *Barb.*, 619.

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 For Undermining Land and Buildings.
 

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fence, of the value of            dollars, and killed forty fruit-bearing apple-trees in said orchard, and consumed and destroyed the plaintiff's grass growing on said land, to his damage            dollars.

540. *For Undermining Plaintiff's Land.*

I. That at the times hereinafter mentioned, the plaintiff was possessed of certain pasture-land, being a part of his farm in the town of, &c. [*or other brief designation*].

II. That in the month of            18    , the defendant wrongfully and negligently excavated the land adjacent to the plaintiff's said land, and took away soil therefrom, without leaving proper and sufficient support for the soil of the plaintiff's land in its natural state, whereby it sank and gave way, to the damage of the plaintiff            dollars.

541. *The Same, where Plaintiff is the Reversioner.*

I. That at the times hereinafter mentioned, the plaintiff was, and still is, (*w*) the owner of certain land [*designate it, as above*], which was then in the occupation of M. N., as tenant thereof to the plaintiff.

II. [*As in preceding form.*]

542. *The Same, where Plaintiff's Buildings were Undermined.*

I. That at the times hereinafter mentioned, plaintiff was possessed of certain land, with buildings thereon, being his house and lot in the village of            [*or other brief designation of the premises*], which were supported by the adjacent land and the soil thereof, and that the plaintiff was entitled to have them so supported. (*x*) .

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(*w*) As to whether the averment that plaintiff is still owner is necessary, see *Robinson v. Wheeler*, 25 *N. Y.*, 252.

As to what a landlord may recover in such action, see *Eno v. Del Vecchio*, 4 *Duer*, 53.

(*x*) Alleging the right to support, which it is necessary to do in the case of an acquired right to support for

buildings (*Peyton v. Mayor, &c.*, of London, 9 *Barn. & C.*, 725), is not necessary in the case of the natural right to support for the soil. *Earl of Lonsdale v. Littledale*, 2 *H. Blackst.*, 267; *Humphries v. Brogden*, 12 *Q. B.*, 740; *S. C.*, 44 *Eng. Com. L. R.*, 738. Compare *Hilton v. Whitehead*, 12 *Q. B.*, 734; *S. C.*, 44 *Eng. Com. L. R.*, 733.

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Actions for Damages Caused by Negligence.

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II. That in the month of \_\_\_\_\_, the defendant wrongfully and negligently excavated the land adjacent to plaintiff's said land and buildings, and took away the soil therefrom, without leaving proper or sufficient support for the plaintiff's said land and buildings, whereby the same sank and gave way, and the house fell in and was destroyed, and the goods of the plaintiff were damaged and broken; and the plaintiff incurred expense in procuring another house, and in removing and repairing his goods, and in removing the ruins of the house and rebuilding the same, to his damage \_\_\_\_\_ dollars.

*543. For Negligence of Mill Owners, whereby Plaintiff's  
Land was Overflowed. (y)*

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, the plaintiffs were [and still are] the owners of a valuable mining claim [or, lands and mines thereon], situated at \_\_\_\_\_, upon which they had bestowed great labor in putting the same in working order, and had incurred large expense in the purchase of tools for the purpose of extracting gold therefrom.

II. That at the same time the defendants were engaged in furnishing water to miners and others, by means of a ditch or canal; and they were the owners of [or, were possessed of, and using] a reservoir situated on \_\_\_\_\_, wherein they collected a large body of water, which water would otherwise have flowed down the said stream.

III. That afterwards, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the plaintiffs being engaged in the prosecution of their work as aforesaid, the defendant's said reservoir, by reason of some defect in its construction, insufficiency for the purpose for which it was constructed, or carelessness and mismanagement on the part of the defendants, broke away, discharging an immense and unusual body of water, which they had collected in said reservoir; which said water so discharged flowed in and upon plaintiffs' mining

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(y) This form is sustained by *Hoffman v. Tuolumne County Water Co.* (10 Cal., 413), and by *Tuolumne Water Co. v. Columbia, &c., Water Co.* (*Id.*, 193). It is no objection that the respect in which the defendants were negligent is described in the alternative. Whether the negligence was in one or another particular, it does not require separate counts. *Hoffman v. Tuolumne County Water Co.*, *supra*; *S. P., Gale v. Tuolumne County Water Co.*, 14 *Id.*, 25

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For Cutting Fruit-trees on Plaintiff's Land.

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claim [*or*, lands and mines], filling the same with great quantities of earth, stone, and rubbish, and carrying off and destroying the lumber and tools used by the plaintiffs in working and mining the same, to plaintiffs' damage                      dollars.

*544. Against the City of New York, to recover Damages to Fruit-trees, done by Negligence of Public Servants.*(z)

I. That the defendants are a municipal corporation, duly incorporated under and by virtue of the laws of the State of New York.

II. That at the times hereinafter specified they were, and still are, the owners of [*designating defendant's land*], being land upon which the Croton Aqueduct is constructed.

III. That the plaintiff, in and during the year 1857, was the owner in fee of [*designating his land*], bounded by and adjoining the said lands of the defendants.

IV. That prior to January, 1857, aforesaid, there were upon the lands of the plaintiff, near and in a line parallel, or nearly parallel, with the northwesterly line of the defendant's said lands, seven large fruit-trees, bearing very choice fruit, and of great value, as well for ornament and shade as for fruit, which trees greatly enhanced the value of the said land; and that there were also near the said fruit-trees other and similar fruit-trees upon the defendant's said lands.

V. That in the said year 1857, and prior to the wrongful acts of the said defendants hereinafter set forth, the said defendants, through the officers of the Croton Aqueduct Department, in the discharge of their duties in the care and management of the said Croton Aqueduct, directed their agents and servants to cut down and remove from the said Croton Aqueduct lands all the trees thereon, and employed divers agents and servants to perform that work. (a)

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(z). This form is sustained by *Carman v. Mayor, &c., of N. Y.*, 14 *Abbotts' Pr.*, 301.

As to trespass against an adjoining owner for destroying living trees, see *Dubois v. Beaver*; 25 *N. Y.*, 123.

(a) In *Gould v. Sub-district No. 3* (7

*Minn.*, 203), it was *Held*, that in an action against a corporation for wrongful acts done by its agents, it is generally sufficient to allege that the acts were done by the corporation, without mentioning agents. It is not improper, however, to state it as above.

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Actions for Damages Caused by Negligence.

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VI. That thereafter the said agents and servants of the said defendants entered upon the performance of the said work so directed to be done by the said defendants, but by reason of the carelessness, unskilfulness, and ignorance of their said agents and servants, and their want of knowledge of the lines of the said Croton Aqueduct lands, and the negligence of the said defendants in not having the said work superintended, managed, and directed by competent and discreet engineers, or other persons conversant with the boundary lines between the lands of the plaintiff and those of the said defendants, the said first-mentioned fruit-trees were wholly cut down, destroyed, and carried away from the lands of the plaintiff by the said agents and servants of the said defendants, and the said plaintiff's lands were greatly damaged and injured,—to wit, in the sum of one thousand five hundred dollars.

VII. And the plaintiff further shows that heretofore, and on or about the 21st day of August, 1861, he presented in writing to the comptroller of the city of New York the claim hereinbefore set forth, upon which this action is founded, for adjustment, and that at least twenty days have elapsed since the presentation of the said claim for adjustment as aforesaid.

VIII. And the plaintiff further shows, that heretofore, and on or about the 27th day of September, 1861, and after the expiration of the said twenty days from and after the presentation of the said claim to the said comptroller, as aforesaid, he made a second demand, in writing, upon the said comptroller for the adjustment of the said claim, but the said comptroller has hitherto wholly neglected and refused to make an adjustment or payment thereof.

*545. Against Owner of Vehicle Negligently Driven by Servant against Plaintiff's Vehicle ;—Showing Damage to Person and Property.*

I. That on the                      day of                      18                      , the plaintiff was riding along the public highway, in the town of                      , in a chaise, drawn by a horse, both the property of the plaintiff, (b) of the value of                      dollars.

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(b) Under this averment plaintiff recover accordingly. See *Gorum v. Carey*, 1 *Abbotts' Pr.*, 285.

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 For Railroad Collision.
 

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II. That the defendant was then the proprietor of a stage and four horses, which were then passing along said highway in the possession of defendant [*or*, of defendant's servant], who was driving the same.

III. That defendant [*or*, that said servant] so carelessly drove and managed said stage and horses, that by reason of his negligence said stage struck the plaintiff's chaise, and overthrew and broke the same, and threw down the plaintiff's horse, breaking his leg, and threw the plaintiff out of his chaise upon the ground [*or otherwise describe the accident according to the fact*], whereby the plaintiff was bruised and wounded, and was for days prevented from attending to his business, and was put to great expense in repairing his chaise and in endeavoring to be healed of his own hurts, and he was obliged to kill his said horse in consequence of his leg being broken as aforesaid, to the damage of the plaintiff                      dollars.

546. *Against Railroad Company for Collision with Plaintiff's Vehicle at a Crossing.* (c)

I. That at the time hereinafter mentioned, the defendants, a corporation duly organized under the laws of this State, were the owners of a certain railroad, known as                      Railroad, together with the track, cars, locomotives, and other appurtenances thereto belonging.

II. That on the                      day of                      18                      , while the plaintiff was travelling in a wagon drawn by two horses, all the property of the plaintiff, and of the value of                      dollars, along the public highway from                      to                      , which public highway crosses the railroad aforesaid at a place called                      ; and as the plaintiff had reached said crossing, the defendants carelessly and negligently caused one of their locomotives [with a train of cars attached thereto] to approach said crossing, and then and there to pass rapidly over the track of said railroad, and negligently and carelessly omitted, while so approaching said crossing, to give any signal, by ringing the bell or sounding the steam-whistle, (d) by reason whereof the plaintiff was unaware of their approach.

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(c) For complaint in an action by a passenger, see Form 506, *ante*, 414.                      (d) See *Laws of 1850*, 232, § 39. As to an averment that no signal was given

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Actions for Damages Caused by Negligence.

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III. That by reason of said negligence of the defendants the locomotive struck the plaintiff's horses and threw them down, killing one of them immediately, and so severely injuring the other as to make it necessary to kill him; and also upset the plaintiff's wagon, breaking it so that it is worthless; and also threw the plaintiff out upon the ground, with such force as to fracture his left collar-bone [*or other consequences, according to the fact*].

IV. That thereby the plaintiff has been deprived of the use of said horses and wagon, and was put to great pain and to great expense in endeavoring to cure himself of said injury, and was and still is prevented from going on with his business as \_\_\_\_\_, and is, as he believes, permanently injured, so that he will never be as strong or able to carry on said business as efficiently as before, and was otherwise greatly injured, to his damage \_\_\_\_\_ dollars.

547. *Against the Same, for Killing Cattle.* (e)

I. [*As in preceding form.*]

II. That on the \_\_\_\_\_ day of \_\_\_\_\_ 18\_\_\_\_, the plaintiff was the owner and possessed of certain cattle, to wit [*designating them*], of the value of \_\_\_\_\_ dollars, and which cows and oxen casually, and without the fault of the said plaintiff, strayed in and upon the track and ground occupied by the railroad of the said defendant at M.

III. That the said defendants, by their agents and servants, not regarding their duty in that respect, so carelessly and negligently ran and managed the said locomotive and cars, that the same ran against and over the said cows and oxen of the said plaintiff, and killed and destroyed the same, to the damage of the plaintiff \_\_\_\_\_ dollars.

548. *By a Servant of a Railroad Company, Injured by Defective Machinery.* (f)

I. *As in Form 546.*

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on approaching the crossing, where \_\_\_\_\_ ter & Syracuse R. R. Co., 16 *Barb.*, 167  
the action is founded on the provisions \_\_\_\_\_ (e) This form is from *Nash's Pl. &*  
of this statute, see *Wilson v. Roches- Pr.*, 225.



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For Injuries Sustained by Employee of Railroad Company.

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II. That the plaintiff, on the            day of            18    , at the time of the committing of the grievances hereinafter mentioned, was in the employment of the defendants, as fireman upon a locomotive-engine, the property of the defendants, driven by steam upon their road; (g) and it was the duty of the defendants to provide a good, safe, and secure locomotive, with good, safe, and secure machinery and apparatus.

III. That yet the defendants, not regarding their duty, conducted themselves so carelessly, negligently, and unskilfully in this behalf, that they provided and used an unsafe, defective, and insecure locomotive, of which they had notice. (h)

IV. That for want of due care and attention to their duty in that behalf, on the day and at the place aforesaid, and while the said locomotive was in the use and service of the defendants upon their said railroad, and while the plaintiff was on the same, (i) in the capacity aforesaid, for the defendants, the boiler connected with the engine of the said locomotive, by reason of unsafeness, defectiveness, and insecurity thereof, exploded, whereby large quantities of steam and water escaped therefrom and fell upon the plaintiff.

V. That by reason thereof the plaintiff became, and for a long time remained, ill; and was obliged to, and did, expend about the sum of            dollars in attempting the cure of himself, and was for a number of weeks prevented from pursuing his business, and was otherwise injured, to his damage            dollars.

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(f) This form is sustained by *Kee-gan v. Western R. R. Co.*, 8 *N. Y.* (4 *Seld.*), 175.

(g) This is a sufficient allegation to show that the relation of master and servant existed; but a special contract will not be inferred from such an allegation. *McMillan v. Saratoga & Washington R. R. Co.*, 20 *Bab.*, 449.

(h) It was held in *McMillan v. Saratoga and Washington R. R. Co.* (20 *Barb.*, 449), that in an action to recover damages sustained by an agent or servant, by reason of a defect arising from the negligence of his employer,—*e. g.*,

the case of a railroad engineer injured by an accident caused by the neglect of the company to maintain in repair fences, &c., along the line,—the plaintiff must aver actual notice to the defendants of the defect complained of, especially where that defect was peculiarly within his own knowledge. But the contrary was held in *Byron v. N. Y. State Printing Telegraph Co.*, 26 *Barb.*, 39.

(i) The plaintiff need not aver that he had no notice of the defect. *Indianapolis R. R. Co. v. Klein*, 11 *Ind.*, 38.

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Actions for Damages for Injuries Respecting Personal Property.

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SECTION XIX.

COMPLAINTS IN ACTIONS FOR INJURIES RESPECTING PERSONAL PROPERTY.

[An allegation that the plaintiff was in possession, imports that his possession was lawful. (a) So, too, if the facts show an illegal taking of the goods, it is not essential to designate the act as "wrongful" or "unlawful." (b)

If the complaint alleges a forcible and wrongful taking of goods from the possession of the plaintiff, he need not allege or prove ownership of the goods. (c)

An averment of the value of the property converted, is not material, is not traversable, though it is usual, and not improper. (d)

In an action to recover damages for the wrongful detention of personal property, it is not necessary to set forth the plaintiff's title in the complaint. A general averment of ownership is sufficient; and under it a bill of sale from the former owner may be given in evidence. (e)

In an action against an agent for an actual and wrongful conversion, it is proper, but not necessary, to allege the agency or how the defendant became possessed of plaintiff's property: if this is alleged, the action will be regarded as founded on the tort, and the contract as being stated simply as matter of inducement. (f)

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551. The same, by an administrator.....	459
552. By seller against fraudulent buyer of goods;—for damages for the conversion.....	459

(a) *Sheldon v. Hoy*, 11 *How. Pr.*, 11.

(b) In an action in the nature of trespass *de bonis*, the complaint need not designate the taking as "wrongful" or "unjust," if the facts alleged show that it was. The allegation "wrongful" is a conclusion of law. *Buck v. Colbath*, 7 *Minn.*, 310; *Adams v. Corrison*, *Id.*, 456.

(c) *Kissam v. Roberts*, 6 *Bosw.*, 154, and cases there cited.

(d) *Bac. Abr.*, tit. Tresp., I. 2, and *Trov.*, F., 1; *Connoss v. Meix*, 2 *E. D. Smith*, 314. It was held in *Woodruff v. Cook* (25 *Barb.*, 505), that under an averment in the complaint that the value of the property in suit was about a specified sum, though not controverted by the answer, defendant might show the true value of the property.

(e) *Heine v. Anderson*, 2 *Duer*, 318.

If the plaintiff prefers to aver the source of his title, he should, if it be one like mortgage (the validity of which is a question of law), set forth or annex either the whole instrument, or those provisions which are relied on as giving to it the character of a mortgage. *Fairbanks v. Bloomfield*, 2 *Duer*, 349.

(f) *Samuel v. Judin*, 6 *East*, 333; *Ridder v. Whitlock*, 12 *How. Pr.*, 208; *Frost v. McCargar*, 29 *Barb.*, 617; *Andrews v. Bond*, 16 *Id.*, 633. For complaints alleging agency or contract, see *ante*, p. 479.

For the allegations of a complaint in an action against an agent intrusted with plaintiff's moneys, who fraudulently obtained a release, see *Gould v. Gould*, 36 *Barb.*, 270.

## Conversion of Goods. Trover.

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549. *For Conversion (Trover).*

I. That before and until the time hereinafter mentioned, the plaintiff was lawfully possessed of [*very briefly designate the goods, (g) or, where he was not in possession, say, was entitled to the immediate possession (h) of, designating the goods*], his property, of the value of        dollars. (*i*)

II. That on the        day of       , 18       , at       , the defendant then being in possession of said goods, unlawfully converted and disposed of the same to his own use, (*j*) to the plaintiff's damage        dollars.

(*g*) Where the property consists of many articles, they may conveniently be enumerated in a schedule or exhibit annexed to the complaint, and referred to as such. It is not necessary to state their value severally. See *Root v. Woodruff*, 6 *Hill*, 418.

(*h*) The plaintiff must show, not only a property either absolute or special in the goods, but in addition, that he was entitled to immediate possession. Unless both the right of property and the right of possession concur, the action will not lie. Thus it does not lie in favor of a lessor of chattels during the lessee's right of possession (2 *Schw.*, *N. P.*, 1385, and cases cited, note x). The special property must arise from possession. *Hotchkiss v. McVickar*, 12 *Johns.*, 408; *McCurdy v.*

*Brown*, 1 *Duer*, 101. Possession, without an absolute vested interest, was not sufficient to maintain trover. *Tuthill v. Wheeler*, 6 *Barb.*, 362. But it was sufficient to maintain trespass *de bonis asportatis*. *Gelston v. Hoyt*, 13 *Johns.*, 561; affirming *S. C.*, *Id.*, 141.

(*i*) The averment of value is usual, but it is not material and not traversable. *Connoss v. Meir*, 2 *E. D. Smith*, 314.

(*j*) This is a sufficient allegation of the conversion; it is not necessary to set out the manner in which the defendant converted the property. *Decker v. Mathews*, 12 *N. Y.* (2 *Kern.*), 313. See, also, *Hunter v. Hudson River Iron & Machine Co.*, 20 *Barb.*, 493. To the same effect is *Esmay v. Fanning*, 9 *Id.*, 176.

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 Actions for Damages for Injuries Respecting Personal Property.
 

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550. *The Same, by Assignee after Conversion. (k)*

I. That before and until the time hereinafter mentioned, one M. N. was lawfully possessed of [*very briefly designate the goods*], [*or, was entitled to the immediate possession of, designating the goods, &c.*], the property of the said M. N., of the value of            dollars.

II. That on the            day of           , 18   , at           , the defendant being then in possession of said goods, unlawfully converted and disposed of the same to his own use, to the damage of said M. N.            dollars.

III. That on the            day of           , 18   , said M. N. duly assigned (*l*) to the plaintiff his claim against the defendant for damages for said conversion.

(*k*) A claim for damages arising from the wrongful conversion of personal property, is a chose in action that is assignable (*People v. Tioga C. P.*, 19 *Wend.*, 73), and under the Code the assignee may sue upon it in his own name. Such a claim will pass by a general assignment in trust for the payment of creditors. And a new demand by the assignee is unnecessary. *McKee v. Judd*, 12 *N. Y.* (2 *Kern.*), 622. But until an actual conversion of the chattel, amounting to the destruction of its identity, or a parting with the possession of it by the wrongdoer, the owner may assign his *title to the chattel* instead of his *claim to damages*, and the assignee may either proceed as owner in an action for the possession, or to recover damages for its detention. In the latter case, the complaint must show an assignment to the plaintiff of the original owner's claim for damages; or if it shows an assignment of the *property* only, it must aver a demand thereof by the plaintiff subsequent to the assignment. *Howell v. Kroose*, 2

*Abbotts' Pr.*, 167; *Sherman v. Elder*, 1 *Hill.*, 178. See, also, *Duell v. Cudlipp*, *Id.*, 166. Compare *Heine v. Anderson*, 2 *Duer*, 318; *Thurman v. Wells*, 18 *Barb.*, 500.

The plaintiff cannot, upon a complaint charging a conversion of personal property after its assignment to him, recover for a conversion before its assignment. The case is not that of a variance, but the causes of action are entirely distinct. *Whittaker v. Merrill*, 30 *Barb.*, 389.

(*l*) It is not necessary to allege the consideration of the assignment, although such assignment was made after the conversion and during the detention. *Vogel v. Badcock*, 1 *Abbotts' Pr.*, 176.

In an action by an assignee before the conversion, it is not necessary to set forth his title in the complaint. A general averment of ownership is sufficient, and under it a bill of sale from the former owner may be given in evidence. *Heine v. Anderson*, 2 *Duer*, 318.

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By Administrator. Fraudulent Buyer. Conversion of Note.

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551. *The Same, by an Administrator. (m)*

I. [*As in preceding form.*]

II. That on the            day of            , 18    , the same came into the possession of the defendant, who, though on the day of            , 18    , requested so to do by said M. N. [*or, by the plaintiff*], would not deliver the same to him, but then and ever since wrongfully detained the same.

III. That thereafter and before this action [*or, on the* day of            , 18    ], said M. N. died intestate, and on the day of            , 18    , letters of administration upon the estate of said M. N., deceased, were duly issued and granted to the plaintiff by the surrogate of the county of            of this State, appointing the plaintiff administrator of all the goods, chattels, and credits which were of said deceased, and that the plaintiff thereupon duly qualified as such administrator, and entered upon the discharge of the duties of his said office.

552. *By Seller against Fraudulent Buyer of Goods, for Damages for the Conversion. (n)*

*Allege sale obtained by fraud, as in I., II., and III. of Form 524.*

IV. That the defendant, having so obtained from the plaintiff the possession of said goods, unlawfully converted and disposed of them to his own use, (*o*) to the damage of the plaintiff            dollars.

553. *For Conversion of a Promissory Note. (p)*

I. That on the            day of            , 18    , at            , the plaintiff made his promissory note, of which the following is a

(*m*) This form is supported by *Sheldon v. Hoy*, 11 *How. Pr.*, 11.

(*n*) Perhaps a complaint in this case, if in the ordinary form for conversion, might be obnoxious to a motion to make more definite and certain, by requiring the plaintiff to set forth the circumstances as above. *Hunter v. Hudson River Iron & Machine Co.*, 20 *Barb.*, 493.

(*o*) In this case a demand and refusal

are not necessary to charge the defendant with a conversion; but where the plaintiff has received part payment, he may be bound to offer to return it before suit. Compare *Wheaton v. Baker*, 14 *Barb.*, 594; *Ladd v. Moore*, 3 *Sandf.*, 589.

(*p*) This form is supported by *Decker v. Mathews*, 12 *N. Y. (2 Kern.)*, 313; *S. C.*, 5 *Sandf.*, 439, and cases there cited.

Under such a complaint, the plaintiff

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Actions for Damages for Injuries Respecting Personal Property.

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copy : (q) [*or*, his promissory note dated on that day, whereby he promised to pay                      dollars to the order of M. N., months from date], (r) which note was made and delivered by the plaintiff to M. N., without consideration, and for his accommodation, and with the special purpose and agreement between the plaintiff and said M. N. that it should be offered by said M. N. to the O. P. Bank for discount, and the proceeds thereof, if any, should be applied by said M. N. to the payment of a certain other note theretofore made by the plaintiff for the accommodation of said M. N., dated [*&c.*, *describing note*], and that otherwise it should be returned to this plaintiff.

II. That said first-mentioned note was thereafter offered by said M. N. to the O. P. Bank for discount, who refused to discount the same, and returned it to the said M. N., whereupon the plaintiff became entitled to the possession thereof [*or state other circumstances showing failure in the intended appropriation of the note, as the fact was*].

III. That thereafter, but before the maturity of the note, the defendant, W. X., without the knowledge or consent of the plaintiff or of M. N., unlawfully took said note from the possession of M. N., and delivered it to the defendant Y. Z. ; and that the defendants thereupon wrongfully converted and disposed of it to their own use, by transferring it to a purchaser, in good faith for value, before its maturity [*or*, converted and disposed of it to their own use, whereby the plaintiff was com-

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cannot recover the proceeds of the note as money had and received. *Andrews v. Bond*, 16 *Barb.*, 633.

(q) In trover for a bond or written instrument, the plaintiff cannot be held to an exact description, but he should name the parties to it, and his declaration should show that it was an instrument in writing. *Pierson v. Townsend*, 2 *Hill*, 550.

Bank-notes may be described as follows :—"Certain bank-notes, commonly so called, issued by the                      Bank, one of the incorporated banks of this State, to wit, ten thousand of said bank-notes, of the denomination of one dollar."

*Dows v. Bignall*, *Hill & D. Supp.*, 407. In an action to recover possession of a written instrument, it was held that the question as to whether the instrument was one which could be shown by extrinsic proof to be of any value, was a question of law ; and a copy of the instrument being set out in, or annexed to the complaint, the question must be raised by demurrer, not motion. *Knehue v. Williams*, 1 *Duer*, 597.

(r) If the plaintiff cannot state the exact amount of the note converted, he may state it as "of great value, to wit, the value of," &c., designating a sum. *Bissel v. Drake*, 19 *Johns.*, 66.

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 For Conversion of Bond.
 

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pelled to pay it], (s) to the damage of the plaintiff      dol-  
lars. (t)

554. *For Conversion of a Bond; by Assignee after Conversion.*

I. That in or about the month of      , 18      , at      , one M. N. being the owner of a bond, a copy of which is annexed as a part of this complaint, by his agent, at the request of the defendant, deposited it with the defendant for the purpose of enabling him to ascertain the value thereof, upon an agreement between him and said M. N., that on ascertaining the value, he would either buy the same from the said M. N., and pay him the value thereof, or would return it to him upon demand.

II. That after a reasonable time for ascertaining the value thereof, and on the      day of      , 18      , at      , said M. N. duly demanded from the defendant the said bond, or the value thereof; but the defendant, though admitting that it was in his custody or under his control, refused either to return it or to pay its value to the said M. N., to his damage      dollars.

III. That on the      day of      , 18      , at      , the said M. N. duly assigned to the plaintiff the said bond, together with all his right of action against the defendant and all other persons, to recover its value, or its possession, or said damages.

IV. That the value of said bond, at the time of the commencement of this action, was      dollars.

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(s) A complaint by the maker of a negotiable note, against a person who, before the note has any legal inception, wrongfully negotiates it to a *bona-fide* holder for value, need not aver payment.

And alleging that the defendant wrongfully converted and disposed of it to his own use, without saying in express terms that it had passed to the hands of a *bona-fide* holder, is sufficient after verdict. *Decker v. Mathews*, 12

*N. Y. (2 Kern.)*, 313. The fact that the plaintiff has regained possession, before suit brought, is no defence to an action for the conversion. *Murray v. Burling*, 10 *Johns.*, 172. It only goes to the mitigation of damages. *Reynolds v. Shuler*, 5 *Cow.*, 323; *Connah v. Hale*, 23 *Wend.*, 462.

(t) The amount of the note is *prima facie* the measure of damages. *Ingalls v. Lord*, 1 *Cow.*, 240; *Decker v. Mathews*, 5 *Sandf.*, 439.

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Actions for Damages for Injuries Respecting Personal Property.

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555. *For Unlawfully Taking and Carrying away Plaintiff's Goods (Trespass).*

That on the            day of           , 18   , at           , the defendant unlawfully took from the possession of the plaintiff, and carried away [*here briefly designate the goods*] the property of the plaintiff, of the value of            dollars [and still unlawfully detains the same from the plaintiff], to his damage            dollars.

556. *The Same, the Plaintiff having Regained Possession before Suit brought.*

I. That on the            day of           , 18   , at           , the defendants unlawfully took from the possession of the plaintiff, and carried away [*here very briefly designate the goods*] the property of the plaintiff, of the value of            dollars, and unlawfully detained the same from the plaintiff.

II. That by reason of such unlawful taking and detention of said property, the plaintiff was injured, to his damage            dollars. [*Or, was compelled to pay, and did, on the            day of           , 18   , at           , pay            dollars to            to obtain the return of the same, and, also,            dollars for recartage and reweighing, and sustained other injury, to his damage            dollars*].

557. *For Seizing a Vessel.*

I. That the plaintiff is, and at the time hereinafter mentioned was, the owner of [*designating the vessel*], her tackle, apparel, and furniture, and that he had chartered the same to one M. N., for a voyage from            to           , and back, for            dollars per month.

II. That when said vessel was at           , engaged in her voyage aforesaid, and in the possession of O. P., her master, appointed by the plaintiffs, the defendants, on or about the            day of           , 18   , forcibly seized the same with her apparel, furniture, and cargo, of the value of            dollars, and brought the same to           . (u)



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By Mortgagee, against Sheriff, &c., for Selling.

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III. That by means thereof the plaintiff has lost the said vessel, her apparel, equipments, and furniture, and the money which he was to receive for the charter for the period of months, and has been put to great cost and expense in and about asserting and maintaining his rights to said vessel, her tackle and furniture.

558. *By Mortgagee of Chattels, Against Sheriff; for Selling them on Execution against a Third Person.* (v)

I. That on or about the            day of           , 18   , one M. N. executed and delivered to the plaintiff a chattel-mortgage [of which a copy is annexed as a part of this complaint]; (w) that the property mentioned and described in said mortgage and the schedule annexed consisted of a lithographic press, of the value of            dollars, or thereabouts; that said mortgage was made in good faith, and without intent to defraud creditors or purchasers, and was given to secure the payment to plaintiff of            dollars, with interest from the date of said mortgage, which sum was theretofore loaned by the plaintiff to said M. N., and which he then owed the plaintiff.

II. That the said M. N. is by trade or occupation a lithographer, and was, at the date of said mortgage, actively engaged in business as a lithographer, and was dependent upon said business or occupation for support and a livelihood; and

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(u) A complaint, in an action to recover the value of a vessel, which averred that the defendants had seized the vessel under an attachment issued under the laws of Connecticut, but did not show or aver that the attachment was void, but merely concluded by averring that the defendants unlawfully converted the vessel to their own use, was held bad on demurrer. *Fairbanks v. Bloomfield*, 2 *Duer*, 349.

(v) This is, in substance, the amended complaint in *Hull v. Carnley* (1 *Abbotts' Pr.*, 153), modified by the addition of an averment that the mortgage was overdue.

For the substance of the necessary averments in a complaint by a vendor

against a sheriff for selling on execution against the vendee goods which he had obtained by fraudulent representations, see *Marsh v. Backus*, 16 *Barb.*, 483.

When a sheriff is liable for the trespass or misfeasance of his deputy, both may be sued jointly for such wrongful act. *Waterbury v. Westervelt*, 9 *N. Y.* (5 *Seld.*), 598; *King v. Orser*, 4 *Duer*, 431; and see *People v. Schuyler*, 4 *N. Y.* (4 *Comst.*), 173.

It is not necessary to set forth the sheriff's official capacity. *Curtis v. Fay*, 37 *Barb.*, 64.

(w) That it is the better course to annex a copy of the mortgage in such a case, see *Fairbanks v. Bloomfield*, 2 *Duer*, 349.

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Actions for Damages for Injuries Respecting Personal Property.

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that the said property so mortgaged was used by the said M. N. in the course of his said business or occupation, and was essential and requisite to him in his said business or occupation; and that said property was left and remained with the said M. N., to enable him to prosecute his said business.

III. That on or about the            day of           , 18   , a true copy of said mortgage was filed in the office of           , in which said county, at the date of said mortgage, the said M. N. resided. (x)

IV. That on the            day of           , 18   , and before the levy and sale hereinafter mentioned, said sum of           , with interest, became due, pursuant to the terms of the mortgage [*or if on demand*, the said sum of           , with interest, was duly demanded from the said M. N. by the plaintiff], but said M. N. failed to pay the same; and thereupon, pursuant to said mortgage, the plaintiff became the owner of said property, and entitled to the immediate possession and control of the same. (y)

V. That thereafter, and on or about the            day of           , 18   , the defendant W. X. issued to the defendant Y. Z., sheriff of the city and county of New York, an execution against the property of the said M. N.; and on the            day of           , 18   , the plaintiff caused a notice to be served upon said sheriff, informing him of said mortgage, and of the default in the payment thereof, and that the plaintiff claimed the property therein mentioned.

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(x) It was held in *Moses v. Walker* (2 *Hill.*, 536) that this allegation was not essential.

(y) This averment is not contained in the complaint in *Hull v. Carnley*. It was there merely alleged that the amount was due at the commencement of the action; and it was held that the defendants were not liable, inasmuch as the plaintiff had not, at the time of the levy and sale, an immediate right to the possession.

Neither before nor since the Code can an action in the nature of trespass or trover be maintained by the mortgagee of chattels, on account of the sale of them upon execution, against either

the officer or the plaintiff in the execution, if, at the time of such sale, the mortgagor is entitled to remain in possession. To maintain such an action, the plaintiff must aver and prove that he had the actual possession, or right of possession, at the time of the alleged conversion. If in such a case the mortgagee has any remedy, it is only by an action founded on the special circumstances of the case, setting forth the injury to his contingent interest in the property, and claiming damages therefor. *Goulet v. Asseler*, 22 *N. Y.*, 225; Compare *Underhill v. Reinor*, 2 *Hill.*, 319; *Hall v. Samson*, 19 *How. Pr.*, 481; *Chadwick v. Lamb*, 29 *Barb.*, 518.

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 For Malicious Injury to Goods.
 

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VI. That on or about the            day of            , 18    , regardless of said mortgage, the said sheriff wrongfully sold said [mortgaged property]; and thereafter returned said execution satisfied.

VII. That the said W. X. directed said sheriff to make such levy and sale without regard to said mortgage, and agreed to indemnify him against any and all damage that might arise from said levy and sale; and that after said sale he received the proceeds, or a portion thereof, to his own use and benefit.(z)

VIII. That since said sale the plaintiff has demanded of said sheriff the mortgaged goods, but he refused to deliver the same; and that thereupon plaintiff demanded of the said sheriff the proceeds, or value thereof, of said property, but he refused to pay over any part thereof.(a)

IX. That by reason of the premises the plaintiff has been injured, to his damage            dollars.

559. *For Malicious Injury.*

That on the            day of            , 18    , at            , the defendant, wilfully and maliciously intending to injure the plaintiff, cut, broke, mutilated, and defaced [or state other injury] certain [very briefly designating the things], the property of the plaintiff, of the value of            dollars; and wholly destroyed the same [or, and greatly injured them, so that the plaintiff was obliged to expend            dollars in repairing the same], to his damage            dollars.

560. *The Same, Claiming Increased Damages under the Statute.*(b)

That on the            day of            , 18    , the defendant maliciously and wantonly destroyed [or, injured, or, defaced, or both] six ornamental trees, of the value of            dollars, the property of the plaintiff, growing upon his land [in the highway], at            [by barking and girdling them, or otherwise

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(z) As to the liability of the attorney who communicated the directions of his client to levy, see *Ford v. Williams*, 13 N. Y. (3 Kern.), 577.      it was held not necessary to allege that plaintiff made demand before suit.

(a) In *Moses v. Walker* (2 Hill., 536),      (b) The statute of this State, which gives quintuple damages, is the Laws of 1853, 1055, ch. 573.

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Actions for Damages for Injuries Respecting Personal Property.

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*state nature of injury, if they are not alleged to be destroyed*]; and maliciously and wantonly injured about fifty feet in length of fence, of the value of            dollars, the property of the plaintiff, on his land at           , by breaking off the pickets, so that the plaintiff was obliged to expend            dollars in repairing it; whereby the defendant, by force of the statute For the More Effectual Prevention of Wanton and Malicious Mischief, became liable to the plaintiff in the sum of [*five times the actual damage.*]

561. *Against City or County, for Damage done by Mob or Riot.* (c)

I. That at and before the times hereinafter mentioned the plaintiff was the occupant of the store and basement, with appurtenances, in the building known as No.           , in street, in           , and therein he conducted a business as a gunsmith, and dealer in guns, pistols, gun materials and fittings, and military equipments, fishing tackle, apparatus, and equipments. (d)

II. That on the            day of           , 18           , and less than three months before the commencement of this action, a mob of disorderly and riotous persons collected together in said [town], and created a riot.

III. That on said day the rioters broke into the plaintiff's said store and premises, and carried away therefrom and destroyed his goods and merchandise. [That a number of articles he was able to and did save from the rioters, by concealing them in the said basement. That he used all diligence to prevent the breaking open of his store and the destruction and injury of his aforesaid property, but was unable to prevent the same.] (e)

IV. That on, &c., being apprised of a threat or attempt on the part of the rioters to destroy or injure his property, he immediately notified the mayor of said city [*or, the sheriff of said*

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(c) This action is given by the Laws of 1855, 800, ch. 428.

(d) As to whether the nature of plaintiff's business may affect the right to recover, see *Blodgett v. City of Syracuse*, 36 *Barb.*, 526.

(e) It is not essential to deny negligence on the part of the plaintiff. *Wolfe v. Supervisors of Richmond*, 11 *Abbotts' Pr.*, 270; S. C., 19 *How. Pr.*, 370.

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For Chasing Cattle. Shooting Dog. Goods received Illegally.

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county; or where the action is against the mayor or sheriff, notified the defendants] of all the facts brought to his knowledge in relation to such threat or attempt.

V. That the said defendants, though having due notice of the said riot immediately upon its breaking out, did not themselves protect the plaintiff's property, but neglected so to do.

VI. That the value of his said goods and chattels so destroyed or injured by the said rioters was            dollars, after deducting the value of all goods returned to him by the police, as retaken from the rioters; and he also sustained            dollars damage, by the breaking of his store, and injury to the building, and the breaking up of his business for            days thereafter by reason of the destruction of his stock of goods. (f)

562. *For Chasing Plaintiff's Cattle.* (g)

That on the            day of           , 18   , at           , the defendant chased and drove about [*designate the cattle*] of the plaintiff, of the value of            dollars, whereby they were greatly damaged and injured, and            of them were killed [*or, bruised, according to the fact*], to the damage of the plaintiff            dollars.

563. *For Shooting Plaintiff's Dog.* (h)

That on the            day of           , 18   , at           , the defendant maliciously shot and killed a dog, the property of the plaintiff, of the value of            dollars, to the damage of the plaintiff            dollars.

564. *For Goods received Contrary to Statute.* (i)

That on or about the            day of           , 18   , the defendant received [ten shares of stock of the            Company], of the

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(f) If the action is against a city, it may be necessary to aver presentation of the claim before suit, for which see Form 184, *ante*, 139.

(g) This form is from *Nash's Pl. & Pr.*, 250.

(h) This form is from *Swan's Pl.*, 296.

(i) By 2 Rev. Stat., 352, § 3, it was required that in an action of trover for any thing received by defendant in violation of a statute, the declaration must set forth "that such goods, &c., were converted by defendant contrary to the provisions of such statute." This was held imperative in *Schroeppel v. Corning*, 2 N. Y. (2 Comst.), 132; 5 Den.,

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 Actions for Injuries Respecting Real Property.
 

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value of            dollars, the property of the plaintiff, as [security for a usurious loan made by the defendant to the plaintiff, of the sum of            dollars, for            months, on interest at the rate of            per cent. per annum], and that said [stock] was converted by the defendant contrary to the provisions of the statute ["Of the Interest on Money"], to the plaintiff's damage            dollars.

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## SECTION XX.

## COMPLAINTS IN ACTIONS FOR INJURIES RESPECTING REAL PROPERTY

[A general averment of title is sufficient. It is enough to say that plaintiff was owner, without setting out the sources of his title. (a) And the allegation of title imports possession sufficiently to sustain an action for trespass upon the land, unless there is something to indicate the contrary. (b)]

In an action for damages, the plaintiff must generally show either title or actual possession in himself at the time the injury was committed. (c)

The former technical rule in respect to stating the time of a trespass, and the repetitions of it, is abolished by the Code of Procedure; and the plaintiff may allege repeated acts of trespass during a specified period, and may still give evidence of other acts before that time, unless the variance has misled the defendant.] (d)

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568. The same, for removing fence. ....	470
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236. The similar provision as to debt or assumpsit was not perhaps imperative (*O'Maley v. Reese*, 6 *Barb.*, 658; *Betts v. Bache*, 14 *Abbotts' Pr.*, 279); nor was the provision of 2 Rev. Stat., 482, § 12,—that if an action of trover be brought to recover any goods or other things forfeited by the provisions of any statute, the declaration may allege that such goods or other things were forfeited according to the provisions of such statute, referring to the same, and that the defendant converted

the same to his own use, without setting forth the special matter.

These provisions have been deemed still in force. *Betts v. Bache*, 14 *Abbotts' Pr.*, 279; *S. C.*, 23 *How. Pr.*, 197; *People v. Bennett*, 5 *Abbotts' Pr.*, 384.

(a) *Daley v. City of St. Paul*, 7 *Minn.*, 390; and see *infra notes (q) and (u)*.

(b) See *Cowenhoven v. City of Brooklyn*, 38 *Barb.*, 9.

(c) *Gardner v. Heart*, 1 *N. Y. (1 Comst.)*, 528.

(d) *Dubois v. Beaver*, 25 *N. Y.*, 123.

## For Trespasses to Land.

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## I. TRESPASSES.

565. *Trespass to Land.* (e)

That on the                      day of                      , 18                      , the defendant broke and entered certain land of the plaintiff [*briefly designating it*], and depastured the same with cattle [to his damage                      dol-lars].

566. *The Same. Another form.*

That on the                      day of                      , 18                      , at                      , (f) the

(e) This form is from *Chitty's Forms of Pr.*, 94.

It seems that mere possession, if peaceable and exclusive, is sufficient to enable the plaintiff to maintain the action. *Palmer v. Aldridge*, 16 *Barb.*, 131, and cases there cited.

For the averments in a complaint against a person who, instead of passing along the sidewalk of a village street in front of plaintiff's house, stops upon it, and remains there to use abusive language towards him, see *Adams v. Rivers*, 11 *Barb.*, 390.

For a complaint for undermining the party-wall of plaintiff's house, see *Eno v. Del Vecchio*, 4 *Duer*, 53.

For a complaint for an injunction restraining defendant from excavating to undermine plaintiff's land, see *Farrand v. Marshall*, 19 *Barb.*, 380.

(f) Where the town is subdivided intermediate the trespass and the action, the trespass may be laid to have been done in the original town. *Re-naudet v. Crocken*, 1 *Cui.*, 167; *S. C.*, *Col. & C. Cas.*, 219.

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Actions for Injuries Respecting Real Property.

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defendant forcibly broke and entered [*or, wrongfully entered*] (*g*) upon the plaintiff's land [*briefly designating it*], and \* trod down the grass, cut the timber, and otherwise injured said premises, to plaintiff's damage            dollars.

567. *The Same, for Cutting and Converting Timber. (h)*

*As in preceding form, substituting at the \*,*] and there cut down and carried away the trees and timber of this plaintiff, and converted and disposed of the same to his own use, to plaintiff's damage            dollars.

568. *The Same, for Removing Fence.*

*As in preceding form to the \*, continuing,*] took down a fence standing upon said land of the plaintiff, and removed the same, and also then and there erected another fence † on said land, and also then and there disturbed the plaintiff in the use and occupation of said land, and prevented him from enjoying the same as he otherwise would have done, to his damage            dollars.

569. *The Same, where the New Fence was Not on the Line.*

*At the † above, for the words "on said land," substitute,*] and said new fence was not erected upon the true division-line between the land of the defendant and of the plaintiff, nor upon the line of the old fence, but upon the land of the plaintiff, without any right or authority in the defendant so to do; and, &c.

(*g*) The action lies, though the land be not inclosed. *Wells v. Howell*, 19 *Johns.*, 385; *Tonawanda R. R. Co. v. Munger*, 5 *Den.*, 255. But under a count for breaking and entering the plaintiff's close, and taking his goods there, the plaintiff was held to prove the entry into his close. Although the taking of goods is in its nature transitory, if it is coupled with the breaking of the close, which is local, both are made local; and, at common law, both must be proved as laid. *Howe v. Willson*, 1 *Den.*, 181.

Where the complaint simply alleged an entry upon plaintiff's premises and injury to his property, without charging the employment of force, the issue was held to be confined to the acts of the defendant after the entry, and to the damages resulting from such acts. *Turner v. McCarthy*, 4 *E. D. Smith*, 247.

(*h*) For the substance of a complaint by executors, alleging that third persons wrongfully cut timber on the testator's land, and that defendants afterwards entered and removed it, see *Hallock v. Mixer*, 16 *Cal.* 574.



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 For Entering House. Injuring Trees.
 

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 570. *For Entering Plaintiff's House, and Injuring It and His Goods.*

I. That on the            day of           , 18   , the defendant, W. X. [at the instigation and request of the defendant, Y. Z., and being by him employed thereto, and assisted therein], (i) forcibly broke and entered [*or where the entry was without force, wrongfully entered*] the dwelling-house of the plaintiff, situated at           , and broke and injured the walls and doors thereof [*or other injury, according to the fact*], and took and carried away a table and six chairs, the property of the plaintiff, of the value of            dollars, and converted and disposed of said goods to his [their] use [*or, cut, broke, defaced, and injured, &c., as in Form 559*], to the damage of the plaintiff            dollars.

 571. *For Treble Damages for Injuring Trees.* (j)

I. That the defendant, in the month of           , 18   , entered (k) upon the land of the plaintiff, in the town of            [the same being then in the possession of the plaintiff], (l) and did, without the leave of the plaintiff, the owner thereof, cut down [*or, carry off, or, cut down and carry off*] 300 pine-trees and 100 oak-trees [*or otherwise describe the wood, underwood, trees, or timber*], of the value of            dollars; and girdled [*or otherwise despoiled*] other trees [*designating number and kind*], of the value of            dollars; whereby the plaintiff lost said trees and timber, and the land belonging to the plaintiff was greatly damaged and lessened in value, to the amount of            dollars; (m) and thereby the defendant, by the force of section 1 of the statute "Of Trespass on Lands," forfeited and became liable to pay to the plaintiff treble the amount of said damages. (n)

(i) This, though not essential, is a proper allegation where the fact is such. *Ives v. Humphreys*, 1 E. D. Smith, 196.

(j) This remedy is given by 2 Rev. Stat., 338, § 1.

(k) The acts alleged must be essentially acts of trespass, forcible and unlawful; but it need not be alleged that the entry was unlawful. *Van Deusen v. Young*, 29 Barb., 9.

(l) The benefit of the statute is not confined to persons having a present estate in possession. Any person seized of an estate in remainder or reversion, may bring an action under it, notwithstanding any intervening estate for life or years. *Van Deusen v. Young*, 29 Barb., 9.

(m) This is a sufficient allegation. *Van Deusen v. Young*, 29 Barb., 9.

(n) To entitle to treble damages un-

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 Actions for Injuries Respecting Real Property.
 

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572. *For Treble Damages for Forcible Entry or Detainer.* (o)

I. That at the time hereinafter mentioned, the plaintiff was owner of a freehold estate in a certain farm and dwelling-house, barns, and sheds thereon, in the possession of the plaintiff, situate at

II. That on the                      day of                      , 18    , the defendant forcibly entered thereon, and in a forcible manner disseized the plaintiff, and ejected and put him out of said lands and tenements, and by force and with a strong hand kept him out therefrom, to his damage                      dollars; whereby the defendant, by force of section 4 of the statute "Of Trespass on Lands," forfeited and became liable to pay treble the amount of said damages.

## II. NUISANCE.

573. *For Diverting Water from Plaintiff's Mill.*

I. That at the times hereinafter mentioned, the plaintiff was lawfully possessed (p) [*or, if not in possession, the owner in fee*] (q) of a water-mill, called a grist-mill [*or, saw-mill, or otherwise*], situated upon                      Brook [*naming the stream*], at [*stating location definitely, or stating name of mill*].

II. That the plaintiff then had a right to use and employ the water of said brook, and to have the same flow to and through his mill in a convenient and customary manner, according to the natural and usual flow of said brook, and without the hindrance of the defendant or any other person. (r)

der the statute, the declaration must refer to the act; otherwise the defendant cannot be prepared to narrow the claim, by bringing himself within the provisos of the act. *Brown v. Bristol*, 1 *Cov.*, 176. It was held in *Beekman v. Chalmers*, 1 *Id.*, 584, that as this is the only statute which can apply to the case, it is not essential specifically to refer to it by its title; nor is it essential to negative the exceptions. But as there are now other statutes which may apply sometimes, it is well to refer to the title of the act.

(o) This action is given by 2 *Rev. Stat.*, 338, § 4; 8 *Hen.*, 6, c. 9. As to the essential facts to maintain the action, see *Willard v. Warren*, 17 *Wend.*, 257.

(p) That possession by the tenant is a possession by the plaintiff sufficient to support this averment, see *Sumner v. Tileston*, 7 *Pick.*, 198. It is enough to show possession at the time of the injury. *Vowles v. Miller*, 3 *Taunt.*, 137.

(q) Where mills were worked on shares for a time, and then for another period by the same occupant on a lease,

## For Erecting Dam.

III. That on the            day of           , 18   , and on various days between that time and the            day of           , 18   , the defendant [knowing the premises, and intending to injure the plaintiff] wrongfully \* dug up and removed the banks of said brook above said mill, and for            days diverted the water [or, a part of the water] thereof from running to and through said mill [or, built a dam across said brook above said mill, and for            days stopped the water thereof from running to and through said mill]. (s)

IV. That, by reason of such acts of the defendant, the plaintiff's mill, which was able, and before was used to grind            bushels each day, thereafter and during the time aforesaid could only grind            bushels, to the damage of the plaintiff            dollars.

574. *For Erecting a Dam Below, Causing Backwater.*

*As in preceding form to the \*, continuing,* erected a dam and mill upon the same stream, a little below the plaintiff's said mill, and have continued the same ever since, whereby the defendants cause a backwater, that hinders a free course of said stream from the plaintiff's mill, to the nuisance of his mill, and

and the owner sued a third party for damages for interfering with the supply of water during both periods, claiming merely as possessor, it was held that title need not be averred; lawful occupation is sufficient. But to sue as reversioner, that character must be set forth, and, also, the tenancy. *Rich v. Penfield*, 1 *Wend.*, 380.

(r) Where the right rests in contract, the amount of water to which the plaintiff was entitled should be alleged according to the fact. *Wilbur v. Brown*, 3 *Den.*, 356. As to the sufficiency of this averment, see *Twiss v. Baldwin*, 9 *Conn.*, 291; *Williams v. Moreland*, 2 *Barnw. & C.*, 910; *Sheers v. Wood*, 7 *Moore*, 345. If the plaintiff was only entitled to surplus water, his complaint must allege that surplus water existed or would have existed but for the de-

fendant's acts. *Wilbur v. Brown*, 3 *Den.*, 356.

But if the defendant was a wrongdoer, an averment as to the quantity of water to which the plaintiff is entitled, is immaterial. *McDonald v. Bear River, &c., Co.*, 15 *Cal.*, 145; and see *Cro. Car.*, 500, 575. If the complaint shows that defendant was a trespasser, an averment that plaintiff was in possession of the land and mill, without averring riparian ownership, or prior appropriation of the water, is sufficient. *McDonald v. Bear River Mining, &c., Co.*, 13 *Cal.*, 220.

(s) Allegations that defendants diverted the water, and that they stopped it until their dam was full, and then discharged it, carrying down earth and stone, which rendered it useless to plaintiffs, may be united as one cause

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Actions for Injuries Respecting Real Property.

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to the hindrance of his business, to his damage . . . . . dollars  
 [or conclude with paragraph IV].

575. *Against Erector of a Dam which is a Nuisance, (t) Seeking its Abatement, and Damages.*

I. That the plaintiff is, and at the times hereinafter mentioned was, the owner of the freehold (u) of certain lands in . . . , with dwelling-house thereon, known as [*designating the premises*].

II. That in the month of . . . , 18 . . . , the defendant wrongfully raised (v) a dam [*or, a pool of water*] upon his freehold, in the vicinity of the plaintiff's land, whereby \* the water was flowed thereon [*or, on plaintiff's freehold*], (w) to the nuisance of plaintiff's said freehold, and to his damage . . . dollars.

Wherefore the plaintiff demands judgment—

1. That the said nuisance be removed.
  2. That the plaintiff recover of the defendant . . . . . dollars, damages caused thereby, and costs of this action.
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of action. *Gale v. Tuolumne Water Co.*, 14 Cal., 25; *S. P., Hoffman v. Tuolumne County Water Co.*, 10 *Id.*, 413.

(t) The writ of nuisance is abolished; but injuries heretofore remediable by writ of nuisance are subjects of action, as other injuries; and in such action there may be judgment for damages, or for the removal of the nuisance, or both. *Code of Pro.*, §§ 453, 454.

(u) In an action under sections 453 and 454 of the Code, as a substitute for the statutory writ of nuisance, it is held that the plaintiff must aver that he was owner of the freehold at the time of erecting the nuisance, and at that of the commencement of the suit, and that the defendants were tenants of the freehold of the land whereon the nuisance was erected. To obtain judgment for an abatement, the owners must be defendants. *Ellsworth v. Putnam*, 16 Barb., 565. This form of remedy, however, is not favored by the courts.

If the allegation of a freehold is omitted, however, the action may be sustainable as an action for damages, though not for a removal of the nuisance; and to this extent we think *Ellsworth v. Putnam*, which held the complaint demurrable, must be deemed unsound. *Cornes v. Harris*, 1 N. Y. (1 Comst.), 223; *Hess v. Buffalo & Niagara Falls, &c., R. R. Co.*, 29 Barb., 391.

(v) This is the more apt form of allegation, though "erect" would be appropriate.

If a dam at a certain height is lawful, and the owner increases its height, a person injured thereby may recover under a declaration for the wrongful erection and continuance of the dam. *Colvin v. Burnet*, 2 Hill, 620.

(w) In a complaint for overflowing land, &c., the words of the old form, "with force and arms," are unnecessary; but inserting them is surplusage,

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 Actions Respecting Nuisances.
 

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576. *The Same, where the Land has been Transferred.* (x)*Insert after paragraph II. in preceding form—*

III. That on or about the                      day of                      ; 18                      , the defendant [*erector*] conveyed said freehold to the defendant [*continuer*], who, from that time ever since, has been in possession of said freehold and dam, and wrongfully maintains said nuisance; although, on the                      day of                      , 18                      , and before this action, he was by the plaintiff requested to remove and abate the same. (y)

577. *Special Damage to Plaintiff's Land.*

*Conclude paragraph II. in Form 575, from the \*,—e. g., thus:* whereby the plaintiff's grass, of the value of                      dollars, then growing on said meadow, was spoiled, and his meadow made spongy, rotten, and good for nothing; and forty lengths of plaintiff's fence, of the value of                      dollars, have been taken up and carried away.

578. *Against the Erector of a Slaughter-house which is a Nuisance, Seeking Damages.* (z)

I. That the plaintiff is, and at the times hereinafter mentioned was [the owner and] (a) possessed of the house and lot No.                      , in                      street, in the city of                      , which he inhabited with his family.

II. That the defendant was also then possessed of certain premises contiguous to [*or, in the immediate vicinity of*] those of the plaintiff.

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and does not operate to exclude consequential damages. *Darst v. Rush*, 14 Cal., 81.

(x) "In cases of nuisance, the plaintiff shall not go without remedy because the land is transferred to another; but in such case the party by whom the nuisance was erected, and he to whom it was transferred, shall both be named as defendants in the writ." 2 *Rev. Stat.*, 332, § 2. But this provision is held not to apply except where the freehold is shown to be in the parties. *Ellsworth v. Putnam*, 16 Barb., 565.

(y) In an action of nuisance against a continuer, for neglect to remove it, a special request to remove it must be shown. *Hubbard v. Russell*, 24 Barb., 404; but compare, to the contrary, *Brown v. Cayuga & Susquehanna R. R. Co.*, 12 N. Y. (2 Kern.), 486.

(z) This form is supported by *Cornes v. Harris*, 1 N. Y. (1 Comst.), 223; and *Clark v. Storrs*, 4 Barb., 562.

(a) It is not necessary to allege that the plaintiff was the owner, though this is proper with reference to the damages.

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Actions for Injuries Respecting Real Property.

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III. That the defendant, in the month of \_\_\_\_\_, 18\_\_\_\_, erected on his said premises a slaughter-house and cattle-pens, and thereafter \* kept and slaughtered therein large numbers of cattle and hogs, thereby causing noxious and offensive smells, and loud and offensive noises, and tainting and corrupting the atmosphere, so as to render the dwelling-house and premises of the plaintiff unfit for habitation, to the nuisance of the said dwelling-house and premises of the said plaintiff, and to his damage \_\_\_\_\_ dollars.

[IV. *For averment of special damage, see Forms 429 and 430.*]

579. *The Same, Against a Continuer.*

I. *As in preceding form.*

II. That ever since the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the defendant has maintained a slaughter-house on his premises contiguous thereto [or, in the immediate vicinity thereof], and has [*continue as in the preceding form, from the \**].

III. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the plaintiff requested the defendant to remove the said slaughter-house, or to cease using it for that purpose, but he has not done so.

[IV. *Special damage, if any.*]

580. *For an Injunction against Nuisance, and for Damages.*

*State facts as in preceding forms, demanding judgment thus.*  
Wherefore the plaintiff demands judgment—

1. That the defendant be restrained by injunction from erecting or using the said building as a \_\_\_\_\_, or otherwise to the nuisance of the plaintiff, or permitting it to be so used.

2. That the plaintiff recover from the defendant \_\_\_\_\_ dollars damages, and his costs. (b)

581. *For Obstructing a Private Way. (c)*

I. That the plaintiff, at the time hereinafter mentioned, was

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(b) Several persons, having independent claims to relief, may join in a suit to restrain a nuisance which affects the respective claims of both; and in such a suit, the insertion in the prayer for relief of a prayer for an account and damages does not render the bill multifarious, for it may be stricken out. *Murray v. Hay*, 1 Barb. Ch., 59.

(c) That a demand for damages for

## Actions for Waste.

[and still is] possessed of [*here describe his premises,—e. g., a meadow in the town of , and county of* ], and had a right of way therefrom over the adjoining land to the highway [*or, to other land of the plaintiff*], to pass and repass on foot freely at all times [*or, with horses, or, with carts, designating the use of the way according to the fact*].

II. That the defendant, on the day of , 18 , and at other times thereafter, and before this action, wrongfully obstructed said way by [building a fence across it], whereby the plaintiff was for a long time [*or, was, and still is*] prevented from enjoying said way, to his damage dollars

III. *State special damage, if any.* (d)

## III. WASTE.

582. *By Lessor, for Damages for Waste.* (e)

I. That the plaintiff, before and at the time of the committing of the grievances hereinafter mentioned, was [and still is] (f) the owner in fee-simple of the following described lands [*description of premises*].

II. That at the time of the committing of said grievances the defendant held and enjoyed the said premises as tenant thereof to the plaintiff, under and by virtue of a demise to the defendant, made by the plaintiff. (g)

III. That the defendant, with intent to injure the plaintiff in his reversionary interest therein, on the day of , and on other days thereafter, and before this action, without authority, cut down and carried away therefrom one thousand beech-trees, one thousand chestnut-trees [&c.], of the value of dollars.

IV. That during the same time he likewise dug up and car-

obstructing plaintiff's way, and that defendants be compelled to open the way, may be united, see *Getty v. Hudson River R. R. Co.*, 6 *How. Pr.*, 269.

(d) In a private action for obstructing a public way, some special damage must be laid, though it is otherwise in respect to a private way. *Lansing v. Wiswall*, 5 *Den.*, 213.

(e) This is, in substance, the complaint in *Robinson v. Wheeler*, and *White v. Wheeler*, 25 *N. Y.*, 252.

(f) The action lies even after the plaintiff has assigned the reversion. *Robinson v. Wheeler*, 25 *N. Y.*, 252.

(g) That these averments as to title are sufficient, even in a strict action of waste under the statute, see *Carris v. Ingalls*, 12 *Wend.*, 70.

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Actions for Injuries Respecting Real Property.

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ried away one thousand cubic yards of soil and herbage, of the value of                dollars, and converted all the same to his own use.

V. That during the same time he likewise wrongfully [or negligently] (*h*) set fire to and destroyed [the said building] upon the premises, and constituting a part of the realty, and wholly destroyed the same.

VI. That the plaintiff was thereby injured in his reversionary estate in the premises to the amount of                dollars.

583. *The Same, by Devisee.*

I. That at the time of his death, one M. N. was seized in fee-simple of [*describe the premises*].

II. That in his lifetime the said M. N. made and published his last will and testament, whereby he devised the said land to the defendant for the term of                , and afterwards to the plaintiff.

III. That on the                day of                , 18    , at                , the said M. N. died.

IV. That the defendant entered into possession of the same, under the said will.

V. *Continue as in preceding form, III. to VI.*

584. *The Same, by Heirs against Doweress and her Husband.*

I. That one M. N. was in his lifetime seized in fee-simple of lands in                county, of which the following described premises are a part.

II. That on the                day of                , 18    , being so seized, he died intestate, leaving the defendant W. his widow.

III. That the defendant W. thereafter entered on and was possessed as her dower during her life of one-third part of said lands, to wit, the following described premises: [*description of premises.*]

[IV. That the defendant W. afterwards intermarried with the defendant, Y. Z., who entered and was possessed thereof in her right.]

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(*h*) Under an averment that the    be had for negligent waste. *Robinson v. Wheeler*, 25 *N. Y.*, 252.



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For Waste of Lands sold on Execution.

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V. That the plaintiffs were left by the said M. N. his only children and heirs; and as such were, at the time of the committing of the grievances hereinafter mentioned [and still are], entitled to the reversion in the above described premises.

VI. [*Allege waste as in preceding forms.*]

585. *By Purchaser at Sheriff's Sale; for Waste Committed before Conveyance.* (i)

I. That on the            day of           , 18   , the premises hereinafter described, being then owned in fee-simple by one K. L., but being subject to the lien of a judgment theretofore recovered by M. N. against O. P., and docketed in said county, the sheriff of said county, by virtue of an execution thereon, sold the same, which are bounded and described as follows: [*here describe the premises.*]

II. That at such sale the plaintiff became the purchaser, and the sheriff executed and delivered to him a certificate of the sale, and subsequently, and on the            day of           , 18   , and before this action, executed and delivered to the plaintiff a deed of the premises pursuant to the sale, and the plaintiff paid the purchase-money therefor. (j)

III. That intermediate the sale and the delivery of the deed, the defendant, being in possession [*or, the said            being in possession, the defendant, with his consent*], cut and carried from the land one thousand pine-trees [*continuing as in Form 582*].

586. *The Same, by Redemptioner.*

I. [*As in preceding form.*]

II. That at such sale the defendant became the purchaser, and the sheriff executed and delivered to him a certificate of the sale.

III. That afterwards, and before the expiration of fifteen months, the plaintiff, by virtue of a judgment theretofore recovered by him against said           , which judgment was a lien on the premises, duly redeemed the same from said sale, by paying the necessary amount therefor; and thereafter, and on

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(i) This and the following form are based on *Thomas v. Crofut*, 14 N. Y. (4 Kern.), 474.

(j) The deed and payment should be alleged. *Farmers' Bank of Saratoga v. Merchant*, 13 How. Pr., 10.

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Actions for Injuries Respecting Real Property.

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the            day of            , 18    , and before this action, the sheriff executed and delivered to the plaintiff a deed of the premises pursuant to the sale and redemption.

IV. [*As III. in the preceding form.*]

587. *For Forfeiture and Eviction, on Account of Waste. (k)*

I.-IV. [*As in Form 583 ; or, where the defendant is lessee, as I. and II., in Form 582.*]

V. That on the            day of            , 18    , the defendant committed great waste on the said land [cutting down    apple-trees, *or otherwise specify the acts of waste : see Form 582*].

VI. That the injury thereby done to the said property is [more than] equal to the value of the defendant's unexpired term.

VII. That said waste was committed in malice.

Wherefore, the plaintiff demands judgment :

1. That the estate of the defendant in the said property be forfeited ;

2. That he be evicted therefrom ;

3. For [            dollars damages, and for] the costs of this action.

588. *Lessor against Lessee, for Injunction and Damages. (l)*

I. That the plaintiff, being then and ever since owner in fee-simple of the premises hereinafter mentioned, on the            day of            , 18    , by a lease in writing then made between the plaintiff and the defendant, under their hands and seals [*or, under the hand and seal of the defendant*], the plaintiff leased to the defendant [*designate term and premises,—e. g., thus*],—for ten years from said date, at a yearly rent of \$1,000, a certain dwelling-house, with stable and sheds attached, and ten acres of lawn and woodland, orchard and garden, at            , in the county of            , the property of the plaintiff.

II. That said lease contained a covenant on the part of the

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(k) This form is from the Commissioners' Report, p. 107. Paragraphs VI. and VII. are not both essential ; either one is enough to make a case for eviction. *Code*, § 452

(l) This form is, in substance, from the *Equity Draughtsman*, 350. See, also, as to the proper allegations in such a complaint, *Hawley v. Wolverton*, 5 *Paige*, 522 ; *Rodgers v. Rodgers*, 11 *Barb.*, 595.

## For Waste of Leasehold.

defendant, of which the following is a copy: [*copy of the covenant as to waste or repairs*].

[Or, II. That the defendant in said lease covenanted that he would—*stating the substance of the covenant*.]

III. That the defendant took possession of the premises under said lease, the same being then in good repair and condition; but that they have since become ruinous and bad, and the lands very much deteriorated by the wilful mismanagement and improper cultivation thereof by the defendant; that he has ploughed up the garden, destroying the shrubbery and flowers therein, and has cut down ten ornamental and shade trees standing near the house, and has cut down ten apple-trees in the orchard [*or in like manner state other waste, according to the fact*], and has otherwise suffered and committed great waste on the premises; by reason of which waste the premises are worth        dollars less, to be sold, than they were when the defendant took possession thereof; and it would cost        dollars to restore them.

IV. That the defendant threatens to cut down other of the ornamental, shade, and fruit trees, and to remove the partitions in the first story of the house, and turn it into a workshop [*or other threatened waste*].

Wherefore the plaintiff asks judgment:

1. That the defendant may be required to [restore and] repair the premises.

2. That he pay to the plaintiff        dollars damages done to and suffered by the premises (the plaintiff hereby waiving all forfeitures and penalties incurred in respect to said waste). (*m*)

3. That he be required to keep the same in good repair and condition during the continuance of his interest therein, and to manage and cultivate the farm in a proper and husband-like

(*m*) A landlord cannot demand an injunction against a breach of covenant, in the same action in which he demands a forfeiture of the lease. Such reliefs are inconsistent. *Linden v. Hepburn*, 3 *Sandf.*, 668; S. C., 5 *How. Pr.*, 188; 9 *N. Y. Leg. Obs.*, 80. In chancery, a bill for injunction in such case must waive forfeiture and penalty. 3 *Atk.*, 457.

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Our statute, however, forbids waste pending a legal action for damages and forfeiture, and provides that the court may make an order to stay waste, which will be enforced like an injunction. 2 *Rev. Stat.*, 336, §§ 18, 19. So that in many cases the better practice will be to sue in that form, instead of demanding an injunction as a part of the relief.

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 Actions for Injuries Respecting the Person.
 

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manner, according to the terms of the lease, and the custom of the country.

4. That he be enjoined from committing any further waste, and particularly from [*stating particular act to be enjoined*].

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## SECTION XXI.

## COMPLAINTS IN ACTIONS FOR INJURIES RESPECTING THE PERSON.

[In an action for a wrong done by several defendants (other than a conspiracy),—*e. g.*, malicious prosecution,—it is enough, to charge them all jointly, to allege that “they, contriving and maliciously intending to injure the plaintiff,” did, &c., continuing as in the case of a single defendant. (*a*)

In an action for libel or slander, it is not now necessary to state in the complaint any extrinsic facts, for the purpose of showing the application to the plaintiff of the defamatory matter out of which the cause of action arose; but it is sufficient to state generally that the same was published or spoken concerning the plaintiff. (*b*)

This provision applies only to such extrinsic facts as are necessary to show the application, but not to such as are necessary to show the defamatory meaning of the words. (*c*)

It is better that facts to show the defamatory meaning should be alleged directly, and not merely by way of *inuendo*.] (*d*)

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(*a*) *Dreux v. Domec*, 18 *Cal.*, 83.

As to the mode of pleading in cases of conspiracy, see *Tappan v. Powers*, 2 *Hall*, 277; *Jones v. Baker*, 7 *Cow.*, 445; *Forsyth v. Edminston*, 11 *How. Pr.*, 408.

(*b*) *Code of Pro.*, § 164; *Wesley v. Bennett*, 5 *Abbotts' Pr.*, 498.

(*c*) *Fry v. Bennett*, 5 *Sandf.*, 54; *S. C.*, 9 *N. Y. Leg. Obs.*, 330; *Pike v. Van Wormer*, 5 *How. Pr.*, 171; 6 *Id.*, 99; *Caldwell v. Raymond*, 2 *Abbotts' Pr.*, 193; *Blaisdell v. Raymond*, 4 *Id.*, 446; *Culver v. Van Anden*, 4 *Id.*, 375.

(*d*) *Caldwell v. Raymond*, 2 *Abbotts' Pr.*, 193.

## Assaults.

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## I. ASSAULT AND BATTERY, AND FALSE IMPRISONMENT.

589. *For Assault and Battery. (e)*

I. That on the            day of           , 18   , at           , the defendant violently assaulted the plaintiff, and struck him in the face and breast several violent blows, and aimed at him a gun and threatened to shoot him, whereby he put the plaintiff in fear for his life; and maliciously caused a dog to bite the plaintiff; and also tore the clothes from plaintiff's person [*or otherwise describe the violence used, and its consequences; special damage, if any, being stated, thus,—*and the plaintiff was thereby made ill and lame, and disabled from attending to his business for            thereafter, and was compelled to pay            dollars for medical attendance, and has been ever since, and for a long time will be lame], to his damage            dollars.

(e) A complaint which alleges that the defendant assaulted the plaintiff, and at the same time slandered him, states but a single cause of action. The plaintiff may bring his action for the whole transaction, to recover damages for the compound injury he has sustained. *Brewer v. Temple*, 15 *How. Pr.*, 286.

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Actions for Injuries Respecting the Person.

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590. *For the Same, Shorter Form.*

That on the                      day of                      , 18                      , at                      , the defendant assaulted and beat the plaintiff, to his damage                      dollars.

591. *For the Same, Committed by Married Woman.*

That on the                      day of                      , 18                      , the defendant Z., she being then, as now, the wife of the defendant Y. [*continue as in either preceding form*].

592. *For Assault and Battery, and False Imprisonment.*

That on the                      day of                      , 18                      , at                      , the defendant assaulted and beat the plaintiff, and falsely and maliciously imprisoned him, without reasonable cause and without right [and detained him for                      hours, preventing him from attending to his business], to his damage                      dollars.

593. *The Same, a Fuller Form. (f)*

That on the                      day of                      , 18                      , the defendant assaulted the plaintiff, and gave him into the custody of a policeman, and forced and compelled him to go to a police-station, and there caused him to be imprisoned on a false charge then made by the defendant, that the plaintiff had been guilty of a felony, and caused him to be kept in prison for a long time, until he was afterwards brought in custody before one of the police magistrates of                      , and the defendant then again charged him with the said offence; but the said magistrate dismissed the said charge, and caused him to be discharged out of custody.

594. *For False Imprisonment.*

I. That on the                      day of                      , 18                      , at                      , the defendant maliciously, and with intent to injure the plaintiff, by force [compelled the plaintiff to go with him to a police-office, or, to the county jail, or the like, there situate, and there] (g)

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(f) This form is from 1 *Chitty's Forms of Pr.*, 95.

(g) The above form, with the words in brackets inserted, is sufficient even

## Malicious Prosecution.

imprisoned this plaintiff, and then and there detained him restrained of his liberty, for the space of            hours, without reasonable cause, and without any right or authority so to do, and against the will of the plaintiff;\* whereby the plaintiff was not only bruised and wounded, but was also injured in his credit, and was prevented from attending to his necessary affairs and business during that time, and was compelled to expend            dollars in costs and counsel-fees in obtaining his discharge, to his damage            dollars.

II. MALICIOUS PROSECUTION. (*h*)595. *On a Criminal Charge.* (*i*)

I. That on the            day of           , 18   , at           , the defendant, maliciously intending to injure the plaintiff in his good reputation, appeared before           , justice of the peace of said county [*or*, one of the police justices of said city], and, without any probable cause whatsoever, charged the plaintiff, before said justice, with having [feloniously stolen a certain gold watch of the defendant]; and maliciously, and without probable cause, procured said justice to grant a warrant for the arrest of the plaintiff upon the said charge.

II. That the said justice issued said warrant accordingly, and the plaintiff was arrested and imprisoned under the same for            hours [and was obliged to, and actually did, give bail in the sum of            dollars].

III. That afterwards, and on the            day of           , the plaintiff having been examined before the said justice for the said supposed crime, the said justice adjudged him not guilty thereof, and fully acquitted him of the same; and that since

where the imprisonment was had under pretence of legal process.

The particular instrumentality by which the plaintiff was deprived of his liberty, should not be set out in the complaint. If the circumstances of the arrest are set forth, they may be struck out on motion. *Eddy v. Beach*, 7 *Abbotts' Pr.*, 17; *Shaw v. Jayne*, 4 *How. Pr.*, 119.

(*h*) A cause of action for malicious prosecution may be joined with a cause of action for libel or slander. *Watson v. Hazzard*, 3 *Code R.*, 218; *Martin v. Mattison*, 8 *Abbotts' Pr.*, 3.

(*i*) This form is supported by *Secor v. Babcock*, 2 *Johns.*, 203.

For allegations of a complaint against a Vigilance Committee, see *Moloney v Dows*, 2 *Hilt.*, 247.

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 Actions for Injuries Respecting the Person.
 

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that time the defendant has not further prosecuted said complaint, but has abandoned the same. (j)

[IV. That the said charge and the arrest of the plaintiff thereunder were extensively published in several public newspapers, among others, the \_\_\_\_\_, as the plaintiff believes, through the procurement of the defendant.] (k)

V. That by means of the premises the plaintiff was injured in his person, and prevented from attending to his business, and was compelled to pay \_\_\_\_\_ dollars costs, counsel-fees in defending himself, (l) and \_\_\_\_\_ dollars in obtaining bail; and in consequence of the arrest and detention he lost his situation as servant of \_\_\_\_\_; and many persons, hearing of the said arrest, and supposing the plaintiff to be a criminal, have refused to employ him; to his damage \_\_\_\_\_ dollars.

596. *The Same, for Obtaining Indictment, on which a Nolle Prosequi was Afterwards Entered.*

I. That the defendant, maliciously intending to injure the plaintiff in his good name and credit, and to bring him into public disgrace, and to cause him to be imprisoned, and thereby to impoverish and injure him, on or before the \_\_\_\_\_ day of \_\_\_\_\_

(j) Or state a trial of the plaintiff by a jury, if that were the fact, and his acquittal. In a complaint for malicious prosecution, the plaintiff's acquittal must be alleged; and an allegation that he has been discharged, is not sufficient. *Morgan v. Hughes*, 2 *T. R.*, 225; *Bacon v. Townsend*, 2 *Code R.*, 51.

It is not enough to aver that the prosecuting officer declared the complaint frivolous, and refused to try it. *Thomason v. Demotte*, 9 *Abbotts' Pr.*, 242. Compare note (m), *infra*.

But if the complaint shows that the arrest was without jurisdiction, it may be good as alleging a trespass, without averring a determination in favor of plaintiff. *Steel v. Williams*, 18 *Ind. (Kerr)*, 161; *Searll v. McCracken*, 16 *How. Pr.*, 262.

If the plaintiff was convicted, he may

set up that his conviction was fraudulently procured by the defendant, by means which prevented the plaintiff from setting up his defence. *Miller v. Deere*, 2 *Abbotts' Pr.*, 1.

(k) In an action for malicious prosecution, the complaint may aver matter tending to show the defendant's motive,—*e. g.*, a malicious publication, by him procured to be made, concerning the prosecution,—such as would be proper to prove at the trial, as showing special injury. Such averments should not be struck out on motion, as the plaintiff cannot be deemed aggrieved by them. *Brockleman v. Brandt*, 10 *Abbotts' Pr.*, 141.

(l) Expenses of counsel, made necessary by a malicious prosecution, are to be specially alleged. *Strang v. Whitehead*, 12 *Wend.*, 64.



## Malicious Prosecution.

, 18 , procured M. N., then the district attorney in and for the county of , in this State, to issue subpoenas for the purpose of compelling and procuring the attendance of witnesses, among others, one O. P., at a court of Oyer and Terminer, held on the day last mentioned at , in said county, before the grand-jury and persons serving as grand-jurors at such court of Oyer and Terminer, for the purpose of procuring an indictment to be found against the plaintiff, as hereafter more fully stated.

II. That the defendant, at said court of Oyer and Terminer, complained of the plaintiff before the grand-jury, and falsely, and maliciously, and without any reasonable or probable cause whatsoever, charged the plaintiff to the grand-jury with having, by means of false and fraudulent pretences and representations, induced defendant to deliver to the plaintiff certain personal property of the said defendant.

III. That said charge was and is wholly false and untrue, which the defendant then and at all times since well knew.

IV. That defendant falsely, and maliciously, and without any reasonable or probable cause, procured the grand-jury aforesaid to find and present to the said court of Oyer and Terminer an indictment against the plaintiff for said alleged false and fraudulent pretences and representations.

V. That the defendant falsely, and maliciously, and without any reasonable or probable cause whatsoever, procured a warrant, directed to the sheriff or any constable of the said county of , for the arrest of the plaintiff upon the aforesaid indictment, to answer the charges therein made against him as aforesaid, to be issued by the said court of Oyer and Terminer, or by a justice of the Supreme Court, judge of the County Court of said county of , or district attorney aforesaid; and afterwards, on or about the day of , 18, caused the plaintiff to be arrested and to be kept in custody, restrained of his liberty for the space of two days then next following, and afterwards caused him to be carried in custody before the county judge of said county, and to be then and there compelled to give bond to appear for trial therein.

VI. That the plaintiff did appear at the said court of Oyer and Terminer last above mentioned, held in and for the said county of , at , on the day of , 18 ,

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Actions for Injuries Respecting the Person.

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and other days, pursuant to said bond; whereupon the said defendant did falsely, and maliciously, and without any reasonable or probable cause whatsoever, procure the said court, by order entered in its minutes, to send the aforesaid indictment to the Court of Sessions of the said county of \_\_\_\_\_, to be proceeded on and tried therein; and, in like manner, procured the said court of Oyer and Terminer to compel the plaintiff to enter into a recognizance to appear at such Court of Sessions, to answer and stand trial upon the aforesaid indictment against him.

VII. That the plaintiff did appear at the said term of said Court of Sessions, ready and willing to then and there stand trial upon the aforesaid indictment against him, pursuant to and as required by said recognizance. Whereupon the aforesaid district attorney, after consulting and advising with the defendant, and pursuant to his request and instructions, did then and there move the said court that the plaintiff be discharged out of custody, and fully discharged and acquitted of the said indictment and of the supposed offence therein charged against him, and be no further prosecuted thereon; whereupon the said court, having heard and considered all that the said defendant and the people, by the aforesaid district attorney, could say or allege against the plaintiff touching and concerning the said supposed offence, did then and there adjudge, order, and determine that the plaintiff be discharged out of custody, and be fully discharged and acquitted of the said indictment, and be no further prosecuted thereon.

VIII. That the said indictment, complaint, and prosecution, and each of them, is wholly ended and determined in favor of plaintiff.<sup>(m)</sup> IX. [*Allege special damage, if any, as in other cases.*]

597. *The same, for arrest in a Civil Action.*

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_ at \_\_\_\_\_, the defendant, maliciously intending to injure the plaintiff, and without probable cause,<sup>(2)</sup> made

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<sup>(m)</sup> In a recent case in the Supreme Court, from which this precedent was taken, this determination was held (at general term) a sufficient decision in fa-

vor of the accused to sustain the action.  
<sup>(2)</sup> This allegation is inserted in deference to the decision in *Given v Webb*, 7 *Robt.*, 65.

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 Libel. Words Libellous on their Face.
 

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affidavit, and procured one M. N. to make an affidavit, in an action then brought [*or, depending*] against this plaintiff by , in which he falsely and maliciously alleged [*here set forth the grounds of the false arrest*]; and that upon said affidavits the defendant procured to be issued an order of arrest against this plaintiff, under which the plaintiff was arrested and imprisoned for the space of , and compelled to give bail in the sum of dollars.

II. That thereafter said order of arrest was vacated by said court [*or, judge*], upon the ground that [*here set forth briefly the grounds on which it was vacated*].(n)

[*Or, II. That, thereafter, such proceedings were had in such action, that it was finally determined in favor of this plaintiff, and judgment was rendered for him therein.*]

### III. LIBEL.

#### 598. General Form, where the Words are Libellous on their Face.

I. That on the day of , 18 , the defendant maliciously (*o*) [*composed and*] published concerning the plaintiff, (*p*) in a newspaper called the [*or, in a handbill,*

(n) If the order of arrest set forth in the complaint is not void, the complaint must state that the order was vacated, or judgment was rendered for the defendant; or otherwise show that it has been avoided by competent authority. *Searll v. McCracken*, 16 *How. Pr.*, 262; but compare, however, *Fortman v. Rottier*, 8 *Ohio St.*, 548.

(o) A general averment of malice is sufficient; and it is not necessary to aver want of probable cause. *Purdy v. Carpenter*, 6 *How. Pr.*, 361.

Where the matter charged is libellous as matter of law, an allegation that it was false and malicious is unnecessary; and if it were necessary, an allegation that it was a libel is a sufficient allegation of falsehood and malice. *Hunt v. Bennett*, 19 *N. Y.*, 173; affirm-

ing *S. C.*, 4 *E. D. Smith*, 647; *Fry v. Bennett*, 5 *Sandf.*, 54.

The averment usual in the old precedents,—that the defendant, well knowing the premises, &c., maliciously intending to injure the plaintiff, &c., and to bring him into great scandal and disgrace, and to cause it to be believed that the plaintiff had been guilty,—were not averments necessary to be proved, but mere suggestions, by way of inducement to the libel, and are superfluous under the Code. *Coleman v. Southwick*, 9 *Johns.*, 45.

(p) The Code has dispensed with the necessity of stating in a complaint for libel, by way of inducement, extrinsic facts necessary to show the application of the words charged to the plaintiff. *Culver v. Van Anden*, 4 *Abbotts' Pr.*,

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 Actions for Injuries Respecting the Person.
 

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which he caused to be circulated and posted], (q) to wit [copy of the false and defamatory matter following, (r) to wit [copy of the article complained of; or say, a certain article, containing the false and defamatory matter following, to wit: and give extracts from the article, including all the objectionable matter]. (s)

II. That by means of said publication the plaintiff was injured in his reputation, (t) to his damage                      dollars.

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375. And on demurrer to a complaint for libel, containing the averment authorized by section 164 of the Code, that the words complained of were published "concerning the plaintiff," the court is bound to assume that the article referred to the plaintiff. *Wesley v. Bennett*, 5 *Abbotts' Pr.*, 498.

(g) Alleging that defendant sent a letter to the plaintiff, and the same was, by means of such sending thereof, received and read by plaintiff, and thereby published by the plaintiff, is bad; for the letter is to be presumed sealed, and sending a letter is not publication. *Lyle v. Clason*, 1 *Cal.*, 581.

(r) It has been customary to say "that the defendant on, &c., falsely and maliciously published, &c., the false, malicious, scandalous, and defamatory matter following." This reduplication of words is wholly useless.

(s) A declaration for a libel must set it out. It is not enough to state its purport. *Wood v. Brown*, 6 *Taunt.*, 169; *S. C.*, 1 *Eng. Com. L. R.*, 560. It is not necessary to set out the whole of the obnoxious publication, but the pleader may extract only particular passages complained of, provided their sense be clear and distinct. *Culver v. Van Anden*, 4 *Abbotts' Pr.*, 375; *Cheetham v. Tillotson*, 5 *Johns.*, 430.

If the libellous article was published in a foreign language, set it out in the original, and aver also its meaning in English. See *Lettman v. Ritz*, 3 *Sandf.*, 734; *Keenholts v. Becker*, 3 *Den.*, 346; *Wormouth v. Cramer*, 3 *Wend.*, 395.

We do not consider inuendoes necessary under the Code, where the words complained of are libellous upon their face. See note (e), *infra*.

(t) Here aver special damage, if any. See notes (g) and (z), *infra*.

In actions for libel, the law in New York is well settled, that when the court can discern an injurious meaning in the plain and natural purport of the publication itself, some damage is to be presumed; but when the words are not, in their natural and obvious construction, injurious, the plaintiff must aver and prove special damage. *Stone v. Cooper*, 2 *Den.*, 293; *Bennett v. Williamson*, 4 *Sandf.*, 60; *Caldwell v. Raymond*, 2 *Abbotts' Pr.*, 193.

If the injury was wilful or intentional, if express malice is proved, the jury are at liberty to award damages, not only to compensate the actual and pecuniary loss, not only upon the ground of compensation for the mental sufferings of the plaintiff, the public disgrace, &c., but they may further award exemplary damages. *Fry v. Bennett*, 1 *Abbotts' Pr.*, 289; *Hunt v. Bennett*, 19 *N. Y.*, 173. See, also, *Tillotson v. Cheetham*, 3 *Johns.*, 56; *Hoyt v. Gelston*, 13 *Id.*, 141; *Wort v. Jenkins*, 14 *Id.*, 352; *Woodward v. Paine*, 15 *Id.*, 493; *King v. Root*, 4 *Wend.*, 113; *Fero v. Ruscoe*, 4 *N. Y.* (4 *Comst.*). 162; *Allen v. Addington*, 7 *Wend.*, 9; 11 *Id.*, 380; 12 *Id.*, 215; but see *Dain v. Wycoff*, 7 *N. Y.* (3 *Seld.*), 191; and 2 *Greenl. Ev.*, § 253, n. 2, and cases there cited.

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 Libel: Relating to Trade, &c.
 

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 599. *The Same, where the Libel was Published in Defendant's Newspaper.*

I. That at the time hereinafter mentioned the defendant (*u*) was the editor, publisher, and proprietor [*or either, as the case may be; or, the defendant W. X. was the editor, and the defendant Y. Z. was the publisher and proprietor*] (*v*) of The \_\_\_\_\_, a newspaper published at \_\_\_\_\_.

II. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the defendant maliciously composed and published concerning the plaintiff in said newspaper [*or, if only the publisher is sued, maliciously published concerning the plaintiff in said newspaper; or, if both author and publisher are sued, the defendant W. X. maliciously composed for publication, and the defendant Y. Z. maliciously published in said newspaper*], (*w*) [*continue as in Form 598, from the \**].

 600. *For Libel Relating to Business or Profession.* (*x*)

I. That at the time hereinafter mentioned the plaintiff was a \_\_\_\_\_

(*u*) An action of libel may be maintained against two or more defendants, though the general rule is otherwise as to slander. Words uttered by one are not the words of another. But with respect to libels, if one repeat and another write and a third approve what is written, all are makers of the libel. *Thomas v. Rumsey*, 6 *Johns.*, 26. A receiver of a newspaper concern, pending a suit to settle the partnership accounts of its proprietors, will be personally responsible for any publication therein which is improper, although the order of his appointment directs that the defendants may continue to superintend the editorial department. *Marten v. Van Schaick*, 4 *Paige*, 479. But an assignee of a newspaper establishment, as a collateral security, is not liable for a libel published in it. As to the general doctrine respecting the liability of publishers and proprietors of newspapers, of booksellers, &c., see 2

*Greenl. Ev.*, § 416; 2 *Starkie on Slander*, 28-34; *Dunn v. Hall*, 1 *Carter (Ind.)*, 344.

(*v*) It seems, that an allegation that the defendant was the proprietor of the newspaper is sufficient, without otherwise alleging that he published it, or was concerned in its publication. *Hunt v. Bennett*, 19 *N. Y.*, 173; affirming *S. C.*, 4 *E. D. Smith*, 647.

(*w*) It is desirable, in an action founded on a newspaper article not libellous on its face, to name the defendant as being *author* as well as *publisher*, where the fact is so; inasmuch as to authorize a recovery against a *publisher* only, in such case, it is necessary to aver and prove actual knowledge on his part of the extrinsic facts relied on to show the article libellous. See *note (c)*, *infra*.

(*x*) This form is to be employed only when the words charged bore some relation to the plaintiff in his business or

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physician, practising as such, at \_\_\_\_\_, and was of good name and credit as such physician.

II. [*Insert first paragraph from Form 598.*]

III. That by means of said publication the plaintiff was injured in his reputation, and in his said good name and credit as a physician, and in his practice as such, to his damage \_\_\_\_\_ dollars. (y)

601. *The Same, by Merchants, Partners.* (z)

I. That at the time hereinafter mentioned the plaintiffs were [and still are] partners, engaged in business as merchants in buying and selling drygoods at \_\_\_\_\_, under the firm-name of A. B. & Co., and were of good fame and credit as such firm.

II. [*Insert paragraph I. from Form 598.*]

III. That by means of said publication the plaintiffs were injured in their reputation, and in the good name and credit of their firm, and in their said business as merchants, to their damage \_\_\_\_\_ dollars.

602. *For Words not Libellous on their Face. Charge of Crime.*

I. That at the time hereinafter mentioned the house of the defendant had been burned down, and it was suspected that it had been feloniously set on fire.

II. That the defendant, knowing the premises, on the day of \_\_\_\_\_, 18\_\_\_\_, maliciously composed and published concerning the plaintiff the following false libel, to wit: "He," meaning the plaintiff, "kindled the fire," meaning the fire in

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official capacity. Such capacity should be averred only in general terms. See 2 *Greenl. Ev.*, § 412. In other cases, it is not necessary to aver that plaintiff was of good reputation, though this has been customary. The law presumes him to have enjoyed a good reputation, until the contrary is shown, which may be, as matter of defence.

(y) In an author's action, for a publication disparaging his copyright work, special damage must be alleged. *Swan v. Tappan*, 4 *Cush. (Mass.)*, 104.

(z) As to the doctrine that an action for libel will only lie upon words concerning distinguishable persons, and cannot be brought upon words which relate to a class or order of men, see *Sumner v. Buell*, 12 *Johns.*, 475; *Ryckman v. Delavan*, 25 *Wend.*, 186; reversing *White v. Delavan*, 17 *Id.*, 50.

Partners may sue for a libel upon them in respect of their business, but can recover only for injury to the business or credit of the firm. *Taylor v. Church*, 1 *E. D. Smith*, 279.

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defendant's house, "and I can prove it," thereby meaning that the plaintiff had feloniously set fire to said house; to the damage of the plaintiff                      dollars. .

603. *The Same*;—*Charge of Dishonesty, &c., in Business.* (a)

I. That the plaintiff, prior to and at the time of the commission of the grievances hereinafter mentioned, was engaged in business in the city of New York, as a banker and stock-broker, being a member of [*designating his firm*]. (b)

II. That he was then also one of the proprietors of the New York Daily Times, a newspaper published in said city.

III. That until then he had always maintained a good reputation and credit, and that he has never been guilty of any fraud, deceit, stock-gambling, swindling, or any of the offences charged against him in the libel hereinafter set forth; nor, until the publication thereof, was he ever suspected to be.

IV. That the business of this plaintiff as banker and broker has always depended largely on the good reputation and credit of this plaintiff, and on the personal trust reposed in him, and in the said firm, by their customers and the public, in consequence thereof.

V. And this plaintiff further shows, on information and belief, that in December, 1855, there was established a bank, called The Valley Bank of Maryland, organized, or purporting to be organized, under the laws of Maryland, and by residents thereof; that notes of said bank were issued and put in circulation; that the law of Maryland requires security to be given for the payment of notes issued by a banking corporation, but what security, or to what amount, this plaintiff does not know; that no security for the payment of said notes, sufficient either to meet the requirements of said law of Maryland, or to pro-

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(a) This is, with some modification, the complaint which was sustained in *Wesley v. Bennett* (5 *Abbotts' Pr.*, 498), a demurrer to it being held frivolous.

(b) The rule of the former practice, —which required the plaintiff, in an action for defamation, to state by way of inducement any extrinsic facts neces-

sary to support an inuendo,—is still in force, except as to such facts as are requisite to show the application of the words to the plaintiff. *Blaisdell v. Raymond*, 4 *Abbotts' Pr.* 446; *Caldwell v. Raymond*, 2 *Id.*, 193; *Culver v. Van Anden*, 4 *Id.*, 375; *Pike v. Van Wormer*, 5 *How. Pr.*, 171; 6 *Id.*, 99; *Fry v. Bennett*, 5 *Sandf.*, 54.

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vide actually for the payment of said notes, was provided; that during the summer of 1856 the said bank stopped the payment of its notes, and became insolvent, and has not since gone on with business; and that it has since been generally believed that the organization and management of said bank were fraudulent, and conducted with intent to defraud the public, by the issue of notes of said bank without provision or security for the payment of them, and by suffering them to remain unpaid.

VI. And this plaintiff further shows, that he never was, in any way, directly or indirectly, connected with said bank, or interested therein; nor was he, in any way, cognizant of the manner in which it was organized or managed; nor was he, previous to the commission of the grievances hereinafter mentioned, ever suspected so to be.

VII. And this plaintiff further shows, on information and belief, that during the year 1848 or 1849 there was established, or reputed to be established, a bank known as the Plainfield Bank; that said bank failed; after issuing its notes to a very large amount, and that it was generally believed to have been organized and managed with intent to defraud the public.

VIII. And this plaintiff further shows, that the defendant was, at the time hereinafter mentioned [and still is], the publisher and proprietor of the New York Herald, a newspaper published in the city of New York.

IX. That the defendant, well knowing the premises, (c) did,

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(c) In an action for libel against one sued as editor and proprietor of a newspaper, not as author or composer of the article, upon words not libellous on their face, the complaint should aver that the extrinsic fact on which the plaintiff relies to show the libellous character of the words, was known to defendant at the time of the publication. Presumption of malice can only arise when the publication, on its face, is capable of conveying an injurious effect. Every man is presumed to foresee and intend all the mischievous consequences that may justly be expected to flow from his voluntary acts. But

the cases of constructive malice are exclusively such as involve words capable of bearing in themselves a libellous meaning. The law in such cases reasonably presumes that the defendant meant to say exactly what he did say. But the law presumes no more than this, and when a hidden defamatory meaning is sought to be attributed to words in themselves innocent, and on their face containing no such sense, by extrinsic facts outside and independent of the publication itself, the knowledge of such facts must be shown, by averment, to have existed in the breast of the defendant at the time of publica



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on the 15th day of March, 1857, compose and publish in said newspaper, concerning the plaintiff, and concerning the premises, the false and defamatory matter following, (d) to wit:—

“The stock operations of the proprietors of the Daily Times to-day (meaning the 14th day of March, 1857) were as follows:—

“Bought 100 New York Central R. R., 96 $\frac{3}{4}$  cash [*&c.*, *&c.*, *setting forth items*].

“The market does not suit these stock-jobbers (meaning this plaintiff and others, and meaning that this plaintiff had been guilty of violating the statute of this State respecting stock-jobbing). (e) They cannot realize on any of their stocks with-

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tion. *Smith v. Ashley*, 11 *Metc.*, 367; *Dexter v. Spear*, 4 *Mass.*, 115.

A publisher may be liable for the publication of an article clearly libellous, which was inserted in his paper without his knowledge or consent; but not when he is not shown, and cannot be presumed, to have known that the article was intended to bear an injurious meaning.

It does not satisfy this rule that the complaint contains a general averment that the defendant published the words “falsely and maliciously.” That is not sufficient, when the extrinsic fact relied on to make the publication libellous is independent of the words published; in such cases, the pleader should bring home to the defendant a knowledge of that fact. *Caldwell v. Raymond*, 2 *Abbotts' Pr.*, 193. Compare, however, *Hunt v. Bennett*, 19 *N. Y.*, 173.

(d) For phrase to be employed, where it is desired to set out only objectionable extracts of an article, see paragraph I. of Form 598, *supra*, and note (s).

(e) The proper use of inuendoes, in a complaint for defamation under the Code, is difficult to be determined. Before the Code, the position of the defendant in such an action was most

embarrassing; and the rules of pleading and of evidence rendered it very difficult in many cases to secure justice to him. By the Code, the most serious of these difficulties have been removed; but by so much as the defendant's path has been illuminated, by so much the course of the plaintiff has been thrown into shadow. The commissioners seem to have overlooked the peculiarity of the rules of pleading formerly applicable to this class of declarations, and they have omitted to define with any distinctness the mode of complaining to be employed. There has been much diversity of practice, therefore, in this respect, especially in regard to the employment of inuendoes. In many cases, —in the majority, probably,—the old mode of employing inuendoes is still followed. On the other hand, it is not uncommon in practice to meet complaints in which no inuendoes whatever are employed; and, from the form of complaint suggested for the action of libel by the commissioners (*First Report*, 267), it would seem that they did not consider that inuendoes would be requisite in any case.

In our view, inuendoes are in part dispensed with under the new system, and in part retained.

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out loss, and have to make small purchases to do all in their power to sustain prices. Their capital is locked up in so many outside speculations, that their operations in Wall-street (meaning this plaintiff's said business of buying and selling stocks as aforesaid) must, for a time at least, be on rather a limited scale. The profits of the Valley Bank (meaning the Valley Bank of Maryland aforesaid) swindle (meaning that said bank was organized or managed with intent to defraud the public) amounted to between two and three hundred thousand dollars; but they were divided among four or five, the Times proprietors (meaning this plaintiff and his copartners in the New York Times) getting but about one-fourth of the plunder (meaning that this plaintiff was connected with others in swindling the public by means of said bank, and received a portion of the proceeds of the swindling).

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1. Where the words used are not libellous in themselves, but are made so by some extrinsic matter alleged by way of inducement, inuendoes are requisite to connect the words charged with the extrinsic facts.

2. The same rule applies in occasional cases, where the words are made libellous by reference to some extrinsic matter not necessary to be pleaded by way of allegation,—*e. g.*, a public statute. In such case, the extrinsic fact should be suggested by an inuendo.

3. A pleader will be allowed, where it is obviously convenient, to employ an inuendo by way of allegation of the import of the words charged, without going through the form of making a prefatory averment of the extrinsic facts. This is not strictly a proper employment of the inuendo, but it will be indulged where the convenience of pleading demands it. See *Blaisdell v. Raymond*, 4 *Abbotts' Pr.*, 446. Contra, *Caldwell v. Raymond*, 2 *Id.*, 193.

In other cases than the above,—*e. g.*, to connect the words charged with the *colloquium*, or to show the meaning imputed to words libellous in them-

selves,—we consider that inuendoes may be dispensed with; and it will be always a matter of uncertain safety to rely on an inuendo, unsupported by a distinct prefatory averment, to show a libellous meaning not evident from the words themselves.

The inuendo cannot enlarge the meaning of the words spoken, beyond the averment of the intention by which the speaking of the words is introduced, where the words themselves are ambiguous, and do not necessarily impute a crime. *Weed v. Bibbins*, 32 *Barb.*, 315; and see *Fry v. Bennett*, 5 *Sandf.*, 54.

As to the office of the inuendo as employed prior to the Code, consult *Pelton v. Ward*, 3 *Cal.*, 73; *Mott v. Comstock*, 7 *Cow.*, 654; and *Id.*, 658, *note*; *Tyler v. Tillotson*, 2 *Hill*, 507; *Butler v. Wood*, 10 *How. Pr.*, 222; *Tillotson v. Cheetham*, 3 *Johns.*, 56; *Van Vechten v. Hopkins*, 5 *Id.*, 211; *Lindsey v. Smith*, 7 *Id.*, 359; *Vaughan v. Havens*, 8 *Id.*, 109; *Fry v. Bennett*, 5 *Sandf.*, 54; *Andrews v. Woodmansee*, 15 *Wend.*, 232; *Cornelius v. Van Slyck*, 21 *Id.*, 70; *Creswell v. Weed*, 25 *Id.*, 621.

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“They (meaning this plaintiff and others) furnished the whole capital (meaning that this plaintiff, jointly with others, furnished all the capital of the said Valley Bank, and with the intent that it should be used in defrauding the public), which was small (meaning that the capital so furnished was purposely made insufficient to furnish a requisite security for the payment of the bills or notes of said bank, and further meaning that it was insufficient to be in compliance with the requisition of the laws of Maryland), for one-fourth of the profits.

“The Valley Bank (meaning said Valley Bank of Maryland) exploded (meaning failed) sooner than was intended (meaning that the said Valley Bank was founded with the intention that it should fail). It was the intention of its originators (meaning the originators or founders of the said Valley Bank of Maryland, and meaning that this plaintiff was one of them) to get out a circulation of half a million before the collapse (meaning before the alleged intended fraudulent failure of said bank, and meaning that it was the intention of the founders of said bank and of this plaintiff to issue notes of the said bank to the amount of half a million of dollars, and receive the money therefor, and then cause the said bank to fail, and refuse to pay the said notes); but some of the machinery at work gave way (meaning that the plans, imputed as aforesaid to this plaintiff, for carrying into effect the said supposed swindle were unsuccessful), and brought the concern (meaning the said Valley Bank of Maryland) to a dead-lock (meaning that the said fraudulent schemes, so charged to this plaintiff as aforesaid, were in part unsuccessful, and in consequence thereof the said Valley Bank of Maryland failed sooner than its founders had intended, and meaning as aforesaid that this plaintiff and others founded it with the fraudulent intention that it should fail). The old Plainfield Bank (meaning the bank of that name heretofore mentioned) was a small affair compared with the Valley Bank (meaning the said Valley Bank of Maryland). The ultimate fate of the Valley Bank financiers (meaning among others this plaintiff, and meaning that this plaintiff was pecuniarily interested in and connected with the said Valley Bank) will not differ from that which has already overtaken the Plainfield Bank managers.”

X. That the defendant published said article with intent to  
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charge this plaintiff (*f*) with violating the statute of this State relative to stock-jobbing, and to cause it to be believed that he was in danger of becoming insolvent; and with the further intent to cause it to be believed that the Valley Bank of Maryland was founded by this plaintiff and his copartners, the other proprietors of the New York Times, for the purpose of issuing from said bank the notes thereof to the amount of half a million of dollars, of receiving the money therefor, and then of causing the said bank to fail, and refusing to pay said notes; and that for such purpose this plaintiff and his said partners furnished a capital for said bank purposely insufficient either to meet the requirements of the laws of Maryland, or to provide actually for the payment of said notes, on the agreement that they should receive for so doing one-quarter of the proceeds gained from said scheme; and that said article was so understood by those who read it.

XI. That by reason of the premises the plaintiff has been injured in his reputation and credit, (*g*) to his damage                  dollars.

*Second.* And for a further cause of action, &c.

604. *For Libel by Signs.*

That on the                  day of                  , 18                  , at                  , the defendant, contriving to injure the plaintiff in his reputation, and to bring him into public contempt and ridicule, did, in the public street [*or*, square or common] of said                  , wrongfully and maliciously make, and cause to be made, an effigy or figure intended to represent the person of the plaintiff, and hung up and

(*f*) It is proper to aver of an ambiguous article that it was published with a particular intent, and was so understood by its readers (or hearers), and to prove this averment on the trial. *Gibson v. Williams*, 4 *Wend.*, 320; *Wesley v. Bennett*, 5 *Abbotts' Pr.*, 498. This is more proper than to employ an inuendo for the same purpose, as was allowed in *Blaisdell v. Raymond*, 4 *Id.*, 446.

(*g*) When the court can discern an

injurious meaning in the plain and natural purport of the publication itself, some damage is to be presumed, and it is not essential to allege special damage (*Perkins v. Mitchell*, 31 *Barb.*, 461); but when the words are not, in their natural and obvious construction, injurious, the plaintiff must aver and prove special damage. *Caldwell v. Raymond*, 2 *Abbotts' Pr.*, 193; *Stone v. Cooper*, 2 *Den.*, 293; *Bennett v. Williamson*, 4 *Sandf.*, 60.

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caused to be hung up the said effigy, in the view of the neighbors of the plaintiff and of the public then and there assembled, (*h*) by means of which the plaintiff has been greatly injured in his reputation, to his damage          dollars. (*i*)

## IV. SLANDER.

605. *Where the Words are Actionable in Themselves.*

That on the          day of          , 18    , (*j*) at          , the defendant, (*k*) in the presence and hearing of one M. N. [*or*, of a number of persons], (*l*) maliciously (*m*) spoke concerning (*n*) the

(*h*) Blackstone considers, that as to libel by signs or pictures, it is necessary to show, by proper innuendoes and averments of defendant's meaning, the import and application of the scandal. 3 *Blackst. Com.*, 126. The precedents, however, so far as we have noticed, omit innuendoes in cases of this description. We discern no reason for distinction in this respect between libel by signs and libel by words. If the sign is one evidently defamatory by a meaning universally familiar, no averments and no innuendoes are requisite. If extrinsic facts are needed to show the sense in which the sign was used, these must be averred, and the proper innuendoes employed to connect the sign charged with the prefatory matter.

(*i*) An assault and battery committed with a purpose to ridicule the plaintiff or bring him into contempt, partakes of the nature of libel; and in order to recover damages for the injury to reputation, as well as for that to the person, the complaint should be for assault and battery, but should aver intent to defame, and injury to reputation, in addition to the usual averments in actions for assault and battery. Compare *Sheldon v. Carpenter*, 4 *N. Y. (4 Comst.)*, 379; *Watson v. Hazzard*, 3 *Code R.*, 218. Thus, it has been held that, in a complaint for assault and battery, averments of the business of the parties, that the assault was for the purpose of

compelling the plaintiff to give up his business, and of bringing him into disgrace and ridicule, and that the assault, &c., caused him to be ridiculed by, &c., though not essential to a cause of action, are not immaterial. The motives and intent, and the consequences resulting, are material on the question of damages. *Root v. Foster*, 9 *How. Pr.*, 37.

(*j*) It is unnecessary to aver a repetition of the same words at divers other times. The repetition may be given in evidence without being pleaded. *Gray v. Nellis*, 6 *How. Pr.*, 290. A variance between the complaint and the proof, in respect to the time of the slander, is immaterial. *Potter v. Thompson*, 22 *Barb.*, 87.

(*k*) As a general rule, an action of slander will not lie against two persons; but it seems that where the words are alleged to have been uttered in pursuance of a conspiracy between two or more defendants, the action may be maintained. *Forsyth v. Edmiston*, 2 *Abbotts' Pr.*, 430.

(*l*) The complaint is not sufficient, unless it charges the speaking of the words, of and concerning the plaintiff, in the presence and hearing of some person or persons. Anonymous, 3 *How. Pr.*, 406; *Wood v. Gilchrist*, 1 *Code R.*, 117. But plaintiff may amend on the trial, if defendant is not misled. *Wood v. Gilchrist*, *Id.*

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plaintiff (o) the false and defamatory words following: (p) [*set out the words complained of*] (q) as accurately as possible;] (r) whereby the plaintiff was injured in his reputation, to his damage            dollars (s)

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It has been held, however, that an averment that the words were uttered and published, imports an uttering in the presence and hearing of others. *Duel v. Agan*, 1 *Code R.*, 134.

(m) Even where the occasion, upon which the words for which an action of slander is brought were spoken, repels any presumption of malice, and proof of it is necessary to maintain the action, it is sufficient to aver that they were spoken maliciously, without setting forth, in the complaint, the facts and circumstances which show the existence of malice. *Viele v. Gray*, 10 *Abbotts' Pr.*, 1.

(n) By section 164 of the Code, this averment supplies the place of an averments of extrinsic facts to show the application of the words charged to the plaintiff. This averment is indispensable. It cannot be supplied by an innuendo. The averment in use before the Code, that the words were uttered "of and concerning the plaintiff," was always held essential; and if omitted, the statement, by way of innuendo, that the plaintiff was intended, would not cure the defect. *Milligan v. Thorne*, 6 *Wend.*, 412; *Sayre v. Jewett*, 12 *Id.*, 135. It was not enough even to say, that the words were uttered in the course of a discourse or conversation concerning the plaintiff. *Titus v. Follet*, 2 *Hill*, 318.

(o) In an action for slander of a married woman, the husband must, formerly, join with her, if the words were actionable in themselves. If only actionable by reason of special damage, the husband must sue alone. *Klein v. Hentz*, 2 *Duer*, 633; *Beach v. Ranney*, 2 *Hill*, 309; *Code*, § 114. But the acts of 1860 (ch. 90, § 7), and 1862 (ch. 172,

§ 3), give the cause of action to the wife alone.

(p) An averment in the complaint that defendant uttered "certain false and defamatory words and statements of the following tenor and import, and to the following effect, that is to say," &c., is bad; though an allegation of their "substance" might be sufficient. *Forsyth v. Edmiston*, 2 *Abbotts' Pr.*, 430; *Maitland v. Goldney*, 2 *East*, 427; *Cook v. Cox*, 3 *Mau. & S.*, 110; *Ward v. Clark*, 2 *Johns.*, 10; *Finnerty v. Barker*, 7 *N. Y. Leg. Obs.*, 316.

(q) When the slanderous words were spoken in a foreign tongue, the complaint should set them out in the original language, aver their meaning in English, and also aver that the persons present understood the language used. *Keenholts v. Becker*, 3 *Den.*, 346; *Wormouth v. Cramer*, 3 *Wend.*, 395; *Lettman v. Ritz*, 3 *Sandf.*, 734. The complaint is, however, amendable in this respect, upon terms. 3 *Sandf.*, 734.

Where the complaint sets out language used on a single occasion, a part of which is slanderous and the rest is not, the latter portion will not be stricken out as irrelevant. Though it may not be necessary to allege in the complaint all that was said at the time, it is proper to do so. *Deyo v. Brundage*, 13 *How. Pr.*, 221; *Root v. Lowndes*, 6 *Hill*, 518.

(r) Before the Code, the plaintiff was held to strict proof of the words as charged in the declaration; and to meet this rule, it was necessary to state the words in a variety of counts, adapted to the evidence relied on. See *Olmsted v. Miller*, 1 *Wend.*, 506; *Aldrich v. Brown*, 11 *Id.*, 596; *Keenholts v. Becker*, 3 *Den.*, 346; *Fox v. Vanderbeck*, 5

## Slander : Respecting Trade, &amp;c.

606. *For Slander Respecting Plaintiff's Trade, with Special Damage.*

I. That at the time of the commission of the grievances hereinafter mentioned, the plaintiff was engaged in business as merchant [*or otherwise*], and had always maintained a good reputation and credit as such merchant. (*t*)

II. (*u*) That on the                day of                , 18    , at                , the defendant, in the presence and hearing of a number of persons, maliciously, and with intent to cause it to be believed that the plaintiff kept false and fraudulent books of account in his said business, (*v*) spoke concerning this plaintiff and concerning his

*Cow.*, 513; *Howard v. Sexton*, 4 *N. Y. (4 Comst.)*, 157; *Rundell v. Butler*, 7 *Barb.*, 260.

Plaintiff was not bound, however, to prove *all* the words charged. If he proved some of them, and those proved were actionable, it was enough. *Loomis v. Swick*, 3 *Wend.*, 205; *Purple v. Horton*, 13 *Id.*, 9. Compare also *Dioyt v. Tanner*, 20 *Id.*, 190; *Genet v. Mitchell*, 7 *Johns.*, 120. And different sets of words importing the same charge, and laid as spoken at the same time, might, under the former practice, be included in the same count. *Rathbun v. Emigh*, 6 *Wend.*, 407; *Milligan v. Thorne*, *Id.*, 412.

The provisions of the Code respecting variances, however, apply to these actions, and moderate the strictness of the old rule requiring the plaintiff to prove the words as laid. Under the Code, one statement of each distinct slander, as a distinct cause of action, is all that is proper to be inserted in the complaint; and the action will not fail for variance between the words charged and those proved, unless the defendant shows himself to have been actually misled, or unless the variance amounts to an entire failure of proof.

(*s*) The expenses of the suit cannot be taken into view in estimating the damages. *Hicks v. Foster*, 13 *Barb.*, 663.

(*t*) In an action for words actionable only because spoken of the plaintiff in his business or profession, appropriate averments by way of inducement and *colloquium* should be inserted. If a physician brings an action for the speaking of words which are disgraceful to him in his profession, he must aver in his complaint that he was a practising physician at the time the words were uttered, and that they were spoken of and concerning him in his profession; otherwise it is demurrable. *Carroll v. White*, 33 *Barb.*, 615.

(*u*) In pleading, in an action for slander, the same averments are requisite under the Code as at common law, with one exception; viz., that even though it may be uncertain to whom the words were intended to apply, it is no longer necessary to insert in the complaint any averments showing that they were intended to apply to the plaintiff. *Pike v. Van Wormer*, 6 *How. Pr.*, 99; and see *note (n)*, *supra*.

If words are ambiguous, and the sense in which they are generally used does not necessarily make them slanderous, the complaint must allege such circumstances as will show that they were uttered with a slanderous meaning. *Pike v. Van Wormer*, 5 *How. Pr.*, 171; 6 *Id.*, 99.

(*v*) If the slander was couched in

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said business the false and defamatory words following, to wit: "He keeps false accounts, and I can prove it" (*w*) [*or otherwise state the words complained of.*] (*x*)

III. That by reason thereof, a number of persons, and in particular [*name the persons referred to*], (*y*) who had theretofore been accustomed to deal with the plaintiff in his business aforesaid, ceased to deal with him, and the plaintiff was thereby deprived of their custom, and of the profits which he would otherwise have made by a continuance of such dealing, (*z*) and was otherwise injured in his reputation, to his damage dollars:

607. *For Slander of Title. (a)*

I. That the plaintiff being the owner in fee [*or other estate*] of a certain farm, situate in the town of \_\_\_\_\_, and county of \_\_\_\_\_ [*briefly designate the property in question*], caused the same, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at \_\_\_\_\_, to be offered

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ambiguous terms, it may be averred that the defendant, by means of the words, insinuated and meant to be understood by the hearers as charging the plaintiff with the crime imputed. *Rundell v. Butler*, 7 *Barb.*, 260. But if the words are unambiguous, such averment is unnecessary. *Walrath v. Nellis*, 17 *How. Pr.*, 72.

(*w*) That an action lies for words to this effect with the averments in the above complaint, see *Burtch v. Nickerson*, 17 *Johns.*, 217; *Backus v. Richardson*, 5 *Id.*, 476.

(*x*) In an action for slander, in charging the plaintiff with stealing an examination taken by a justice of the peace, an omission to allege that the examination was taken by the justice upon a complaint made before him, and to show whether it was a civil or criminal proceeding, and that the justice had jurisdiction, renders the complaint defective in substance; and this objection is not obviated by the provision of section 161 of the Code, relative to pleading a judgment or de-

termination of an officer of special jurisdiction. *Ayres v. Covill*, 18 *Barb.*, 260.

(*y*) In an action to recover for slanderous words, whereby the plaintiff lost customers in his trade, the plaintiff must name in the complaint the customers lost. And he cannot give evidence, on the trial, of the loss of any customers not so named. *Hartley v. Herning*, 8 *T. R.*, 133; 2 *Phil. Ev.*, 248; *Hallock v. Miller*, 2 *Barb.*, 630.

(*z*) For other cases on the subject of averring special damage in actions of slander, see *Hallock v. Miller*, 2 *Barb.*, 630; *Keenholts v. Becker*, 3 *Den.*, 346; *Beach v. Ranney*, 2 *Hill*, 309; *Herrick v. Lapham*, 10 *Johns.*, 291; *Olmsted v. Miller*, 1 *Wend.*, 506; *Sewall v. Catlin*, 3 *Id.*, 291; *Williams v. Hill*, 19 *Id.*, 305; *Shipman v. Burrows*, 1 *Hall*, 399; *Harcout v. Harrison*, *Id.*, 474.

(*a*) As to this action in general, see *Gerard v. Dickinson*, 4 *Coke*, 18; *Hargrave v. Le Breton*, 4 *Burr.*, 2422; *Earl of Northumberland v. Byrt*, *Oro. Jac.*, 163; *Vaughan v. Ellis*, *Id.*, 213; *Smith*



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 For Slander of Title.
 

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for sale [*or*, to be put up and exposed for sale by public auction].

II. That the defendant, well knowing the premises, and maliciously [and without probable cause] (*b*) contriving to cause it to be suspected that the plaintiff did not own said farm, and could not sell the same, and to prevent him from effecting a sale thereof [procured one M. N. to attend said sale, and maliciously procured said M. N. to state, and] did maliciously (*c*) then and there publicly state [through the said M. N.], in the presence and hearing of O. P. [*or*, of many persons then and there assembled for the purpose of bidding on said property and buying the same], concerning the plaintiff and his said property, the false and defamatory matter following, to wit: [*set out the words complained of, with suitable innuendoes*].

III. That by reason thereof the said O. P. (*d*) was [*or*, various persons, and in particular [*naming the persons referred to, who attended on said auction sale for the purpose of buying thereat, were*] dissuaded from bidding therefor, and refused and still do refuse to purchase the said property in consequence thereof; (*e*) and the plaintiff has been unable to sell the same, [and has been obliged to expend                      dollars in and about the attendance upon said auction], and has been otherwise greatly injured, to his damage                      dollars.

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*v. Spooner*, 3 *Taunt.*, 246; *Pitt v. Donovan*, 1 *Maule & S.*, 639; 2 *Greenl. Ev.*, 428.

For a complaint in an action to recover damages for false statements made by the defendant in regard to the patent and manufactures of the plaintiff, to the injury of his business, see *Snow v. Judson*, 38 *Barb.*, 210.

(*b*) The clause in brackets is proper. *Bailey v. Dean*, 5 *Barb.*, 297.

(*c*) To maintain the action for slander of title, the words must not only be false, but they must be uttered maliciously.

(*d*) In an action for slander of title,

whereby the plaintiff was prevented from obtaining a loan on the mortgage of the property, or from selling it, it is essential to name the person or persons who refused, for that cause, to loan or purchase. If they are not named, the complaint is demurrable. *Linden v. Graham*, 1 *Duer*, 670.

(*e*) The damage sought to be recovered must be specially alleged in the complaint, and substantially proved on the trial. It must be a pecuniary damage, and must be the natural and legal consequence of the wrong. *Kendall v. Stone*, 2 *Sandf.*, 269; 5 *N. Y.* (1 *Seld.*), 14.

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 Actions for Injuries Respecting the Person.
 

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## V. OTHER VIOLATIONS OF PERSONAL RIGHTS.

608. *For Enticing away Plaintiff's Wife. (f)*

I. That M. B. is, and at the times hereinafter mentioned was, the wife of the plaintiff.

II. That in the month of \_\_\_\_\_, 18\_\_\_\_, while the plaintiff was living and cohabiting with and supporting her, in \_\_\_\_\_, and while they were living together happily as man and wife, \* the defendant, well knowing her (g) to be the wife of the plaintiff, and wrongfully contriving and intending to injure the plaintiff, (h) and to deprive him of her comfort, society, and aid [while this plaintiff was temporarily absent], maliciously enticed her away from the plaintiff's and her then residence in \_\_\_\_\_, to a separate residence, in \_\_\_\_\_, and has ever since there detained and harbored her, against the consent of the plaintiff, and in opposition to his utmost peaceable efforts to obtain her from the defendant's custody, control, and influence.

III. That by reason of the premises, the plaintiff has been and still is wrongfully deprived by the defendant of the comfort, society, and aid of his said wife, and has been put to great trouble and expense in endeavoring to recover her from the defendant, and has suffered great distress of body and mind, to his damage \_\_\_\_\_ dollars.

609. *For Criminal Conversation with Plaintiff's Wife. (i)*

I. and II. [*As in preceding form to the \*, continuing*]; the defendant wrongfully contriving and intending to injure the plaintiff and to deprive him of the comfort, society, aid, and assistance of his wife, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, at [forcibly and without the consent of the said M. B., and], wickedly, wilfully, and maliciously debauched and carnally knew the said M. B., without the privity or consent of the plaintiff (j)

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(f) This is substantially the complaint in *Scherpf v. Szadecky*, 1 *Abbotts' Pr.*, 366. *crim. con.*, is an action for injury to the person. 1 *Chit. Pl.*, 137; 2 *Id.*, 265; 2 *Kent*, 129; 3 *Blackst. Com.*, 138; *Delamater v. Russell*, 4 *How. Pr.*, 234; 2 *Code R.*, 147.

(g) See 2 *Chit. Pl.*, 642, note z.

(h) The intention is material. *Hutcherson v. Peck*, 5 *Johns.*, 196.

(j) See *Smith v. Masten*, 15 *Wend*

(i) An action by the husband, for 270.

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 For Seduction.
 

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III. That thereby the affection which the said M. B. theretofore had for the plaintiff was alienated and destroyed, and the plaintiff was deprived of the comfort, society, aid, and assistance which he otherwise would have had from the said M. B., and has suffered great distress of body and mind, (k) to his damage            dollars.

610. *For Seduction. (l)*

I. That on the            day of           , 18   , at            [while the plaintiff was employed as a servant in the family of the defendant], the defendant, with force and arms, ill-treated the plaintiff, and made an indecent assault upon her, and then and there forcibly debauched and carnally knew her, whereby she became pregnant and sick with child, and so remained and continued for the space of            months; at the expiration of which time, on the            day of           , 18   , she was delivered of a child, of which she was pregnant as aforesaid.

II. That in consequence of said indecent assault made by the defendant on the plaintiff, she has suffered greatly in her health, and became sick and disordered, and so continued for the space of            months, during all which time she suffered great pain, and was prevented from transacting her necessary business and affairs, and has been greatly disturbed in her peace of mind, and has been otherwise greatly injured, to her damage            dollars.

611. *For Seduction of Plaintiff's Daughter or Servant.*

I. That at the times hereinafter mentioned, one M. N. was the servant [and the daughter] of the plaintiff.

II. That on the            day of           , 18   , at           , the defendant, well knowing the said M. N. to be the servant [and daughter] of the plaintiff, and wrongfully contriving and intending to injure the plaintiff, and to deprive him of her assistance and service, did, wickedly, wilfully, and maliciously, and without the privity or consent of the plaintiff [forcibly and against the will of the said M. N., abduct her, or,

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(k) That this is a good ground for damages, see *Dain v. Wycoff*, 7 *N. Y.* (3 *Seld.*), 191.      (l) This is the complaint in *Koenig v. Nott*, 8 *Abbotts' Pr.*, 384, inserting the word "forcibly" before "debauched."

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Actions for Injuries Respecting the Person.

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entice and persuade the said M. N. to leave the residence and service of this plaintiff, and did] then and there debauch and criminally know her.

III. That by reason of the premises, the said M. N. became pregnant and sick with child, and so remained for the space of        months; that during that time she was unable to attend to the duties of her service, and the plaintiff was thereby deprived of her service, (m) and was obliged to and actually did expend        dollars in nursing and taking care of her in her said pregnancy and sickness, and was otherwise greatly injured, to his damage (n)        dollars.

612. *Against the Officers of an Election, for Refusing Plaintiff's Vote. (o)*

I. That the defendants were the inspectors [or, judges] of an election held at       , in and for the [naming the district] in the city [or, county] of       , for the purpose of electing [designate officer,—e. g., thus,—] one justice of the peace in and for said town of       ; and being duly elected [or, appointed] and qualified (p) as such inspectors [or, judges], the defendants had the polls open for said election at the town-house in said town, between the hours of        and       .

II. That the plaintiff then was and for the space of        had been a citizen of the State of       , and then was and for the space of        had been resident in said town [or ward, or otherwise, according to the statute], and a legal elector at said election.

III. That as such elector, the plaintiff, while the polls were so open, duly offered to the defendants his vote or ballot for the election of a justice of the peace, in and for said town, and requested them to receive the same.

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(m) Loss of service is an essential element in the case of action by a father or master for debauching child or servant. *Knight v. Wilcox*, 15 *Barb.*, 279; *Dain v. Wycoff*, 7 *N. Y.* (3 *Seld.*), 191. *Nash's Pl. & Pr.*, 245. In 2 *Humphl. Prec.*, 797, it is said there should be a separate count for each ballot refused.

(n) As to rule of damages, see *Peake's N. P. C.*, 55; *Dain v. Wycoff*, 7 *N. Y.* (3 *Seld.*), 191. (p) The allegation that they were duly chosen and qualified may not be necessary. See *Jenkins v. Waldron*, 11 *Johns.*, 114; *Bentley v. Phelps*, 27 *Barb.*, 524; *People v. Cook*, 8 *N. Y.* (4 *Seld.*), 67.

(o) This form is, in substance, from 67.

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 Actions to Recover Possession of Personal Property.
 

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IV. That the defendants, not regarding their duty, wrongfully and maliciously (*q*) refused to receive or deposit the same, whereby he was deprived of his right to vote at said election, to his damage                 dollars.

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## SECTION XXII.

## COMPLAINTS IN ACTIONS FOR THE RECOVERY OF THE POSSESSION OF SPECIFIC PERSONAL PROPERTY (REPLEVIN).

[This action lies under the Code wherever replevin would lie under the Revised Statutes. The plaintiff must show an immediate right to the possession of the property. (*a*)

In designating the goods, a description which is enough to identify them, as far as may be useful for the purposes of delivery by the sheriff, is sufficient. (*b*) It is not necessary to state the value of each separate article; but it is enough if the value of the whole is given. (*c*)

(*q*) In New York, New Hampshire, Pennsylvania, and Indiana, it is held that malice must be shown, to sustain the action. *Jenkins v. Waldron*, 11 *Johns.*, 114; *Wheeler v. Patterson*, 1 *N. H.*, 88; *Weckerley v. Geyer*, 11 *Serg. & R.*, 35; *Carter v. Harrison*, 5 *Blackf.*, 138. It is held otherwise in Massachusetts, Maine, and Ohio. *Lincoln v. Hapgood*, 11 *Mass.*, 350; *Osgood v. Bradley*, 7 *Greenl.*, 421; *Jeffries v. Ankeny*, 11 *Ohio*, 372. Compare *Humphrey v. Kingman*, 5 *Metc.*, 162.

(*a*) The remedy afforded by the former action of replevin is not taken away or impaired by the Code. *Nichols v. Michael*, 23 *N. Y.*, 264; *Savage v. Perkins*, 11 *How. Pr.*, 17; and see *Vogel v. Badcock*, 1 *Abbotts' Pr.*, 176; *McCurdy v. Brown*, 1 *Duer*, 101. It may be brought by any one entitled to the immediate possession, against one having wrongfully taken or wrongfully detaining the chattel. It is not now confined to the case of a chattel taken under pretence of distress, as stated by Blackstone. *Pangburn v. Patridge*, 7 *Johns.*, 140, and cases there cited; *Cresson v. Stout* 17 *Id.*,

116. As to the rules of pleading in the former action of replevin, see 2 *Rev. Stat.*, 522; *Rogers v. Arnold*, 12 *Wend.*, 30; *Wright v. Bennett*, 3 *Barb.*, 451.

The old practice required that the declaration should state a place certain, within the village or town; but the omission was cured by the defendant's pleading over. *Gardner v. Humphrey*, 10 *Johns.*, 53.

(*b*) A declaration, describing certain articles of furniture by name and quantity, and adding that they were the same, and all the goods which defendant received at a particular time, and which were then in, and constituted the furniture of a house designated, sufficiently describes them. *Root v. Woodruff*, 6 *Hill*, 418.

A complaint which claimed only a part of the property mentioned in the affidavit and requisition, originally issued to the sheriff, was held good, it appearing that the other part of the property had been taken from the defendant by an attaching creditor before the summons could be served. *Kerrigan v. Ray*, 10 *How. Pr.*, 213.

(*c*) *Root v. Woodruff*, 6 *Hill*, 418.

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Actions to Recover Possession of Personal Property.

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Where goods wrongfully taken by one person, come into the possession of another, a demand upon the latter before suit against him should be averred, unless it is known that he cannot show that he came into the possession in good faith and for a lawful purpose. (*d*)

Where the relief to be obtained is changed by a delivery of the goods under the statute, it is not necessary to amend the complaint so as to demand only damages.] (*dd*)

- 613. For goods wrongfully taken from plaintiff's possession ;—against the wrongdoer . . . . . p. 508
- 614. For goods wrongfully taken from possession of plaintiff's lessee or bailee ;—against the wrongdoer . . . . . 510
- 615. For goods wrongfully taken from possession of plaintiff's assignor ;—against the wrongdoer . . . . . 511
- 616. Wrongful detention of goods . . . . . 511
- 617. Against one having derived possession innocently . . . . . 511
- 618. By seller against a fraudulent buyer of goods . . . . . 512
- 619. Against a fraudulent buyer and his transferee . . . . . 512

613. *For Goods Wrongfully Taken from Plaintiff's Possession ;—against the Wrongdoer. (e)*

I. That at the time hereinafter mentioned, the plaintiff was lawfully possessed of [*briefly designate the goods*], of the value of dollars, then and ever since his property. (*f*)

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(*d*) *Barrett v. Warren*, 3 *Hill*, 348 ; *Pierce v. Van Dyke*, 6 *Id.*, 613 ; *Hunter v. Hudson Iron & Machine Co.*, 20 *Barb.*, 493 ; *Ely v. Ehle*, 3 *N. Y.* (3 *Comst.*), 506 ; *Tallman v. Turck*, 26 *Barb.*, 167. It is not necessary in such case for the plaintiff to disprove the defendant's good faith and the lawfulness of his purpose ; but the burden of proof is upon the defendant, to vindicate his possession, and show that a demand was necessary before the suit. It seems, therefore, to be the better opinion that in an action against such a one, a demand need not be averred in the complaint, and that the case of *Fuller v. Lewis*, 3 *Abbotts' Pr.*, 383 ; *S. C.*, 13 *How. Pr.*, 219, where an averment of demand was held necessary upon demurrer, is not to be extended ; although the conclusion may very well be justified in an action against an assignee for benefit of creditors, as in that case, for he may be

properly presumed to have come into possession in good faith and lawfully.

(*dd*) *Pugh v. Calloway*, 8 *O. St.*, 488.

(*e*) This action was formerly replevin in the *cepit*. It would not lie for emblements cut and taken by a person who was at the time of the taking in possession of the land, though the act be waste. *Rich v. Baker*, 3 *Den.*, 79 ; *De Mott v. Hagerman*, 8 *Cow.*, 220.

(*f*) The plaintiff must show ownership, or a special property, with an immediate right to the possession. *Clark v. Skinner*, 20 *Johns.*, 465, and cases there cited ; *McCurdy v. Brown*, 1 *Duer* 101 ; *Dodworth v. Jones*, 4 *Id.*, 201.

It is held, however, in *Kuhland v. Sedgwick*, 17 *Cal.*, 123, that either an allegation of ownership, or one of possession, is sufficient without the other, to maintain this action.

It seems that the proper course is to describe the goods as the property of the plaintiff, whether his property be

## Against Wrongdoer, for Taking Goods.

II. That on the                      day of                      , 18                      , at [*here state the place definitely*], the defendant (*g*) wrongfully took (*h*) said goods and chattels from the possession of this plaintiff, and still unjustly detains the same, (*i*) to the damage of the plaintiff (*j*) dollars.

general or special, and without stating the facts which raise the special property. Thus an averment that the plaintiff is entitled to the immediate possession, was held insufficient (*Pattison v. Adams*, 7 *Hill*, 126; *Bond v. Mitchell*, 3 *Barb.*, 304; *Pattison v. Adams*, *Hill & D. Supp.*, 426); and was mere surplusage if inserted in a declaration otherwise sufficient. So was an averment that the goods were his property by virtue of several attachments duly issued. &c. *Vandenburgh v. Van Valkenburgh*, 8 *Barb.*, 217. In an action for *conversion*, brought by a factor who had stored property consigned to him with a third person, from whose possession it had been taken by the defendant, it was held that an averment that the property "belonged to the plaintiff," was supported by proof of his special property in it as a factor. *Gorum v. Carey*, 1 *Abbotts' Pr.*, 285. A consignee is, in law, presumed to be the owner. *Fitzhugh v. Wiman*, 9 *N. Y.* (5 *Seld.*), 559.

(*g*) If the defendant is a sheriff, it is not necessary to describe him as such. He is to be rendered liable in an individual, and not in his official character. *Stillman v. Squire*, 1 *Den.*, 327. The deputy may be joined. *Waterbury v. Westervelt*, 9 *N. Y.* (5 *Seld.*), 598; *King v. Orser*, 4 *Duer*, 431. If the levy was made by the direction of the execution-creditor, he also may be joined. *Allen v. Crary*, 10 *Wend.*, 349; *Acker v. Campbell*, 23 *Id.*, 372; *Marsh v. Backus*, 16 *Barb.*, 483. As to the attorney's liability, see *Ford v. Williams*, 13 *N. Y.* (3 *Kern.*), 577.

A third person who acquires posses-

sion of the goods from the wrongdoer, or jointly with him,—*e. g.*, a partner or agent, or a buyer with notice,—is liable in this action. *Olmsted v. Hotailing*, 1 *Hill*, 317, and cases there cited; and see *Ely v. Ehle*, 3 *N. Y.* (3 *Comst.*), 506. And against such, no demand is necessary. *Pringle v. Phillips*, 5 *Sandf.*, 157.

An action to recover possession of personal property will lie for any unlawful taking or detainer of it, although the defendant, before suit, has parted with the possession of it. *Brockway v. Burnap*, 16 *Barb.*, 309, reversing *S. C.*, 12 *Id.*, 347; *Savage v. Perkins*, 11 *How. Pr.*, 17; *Drake v. Wakefield*, 11 *Id.*, 106; *Ward v. Woodburn*, 27 *Barb.*, 346; *Van Neste v. Conover*, 20 *Id.*, 547; *Nichols v. Michael*, 23 *N. Y.*, 264.

(*h*) Alleging that the defendant took the plaintiff's property, sufficiently imports a wrongful taking. *Childs v. Hart*, 7 *Barb.*, 370. Compare *Reynolds v. Lounsbury*, 6 *Hill*, 534, where it was said that this was a defect, but cured by a verdict.

(*i*) A statement in the complaint that the defendant converted the property to his own use, is unnecessary, but does not vitiate. *Vogel v. Badcock*, 1 *Abbotts' Pr.*, 176.

(*j*) In an action against the wrongdoer for a wrongful taking, no demand need be proved. *Cummings v. Vorce*, 3 *Hill*, 283; *Pierce v. Van Dyke*, 6 *Id.*, 613; *Cary v. Hotailing*, 1 *Id.*, 311; *Stillman v. Squire*, 1 *Den.*, 327; *Zachrisson v. Ahman*, 2 *Sandf.*, 68; *Pringle v. Phillips*, 5 *Id.*, 157.

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Actions to Recover Possession of Personal Property.

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Wherefore this plaintiff demands judgment against the defendant (*k*) for the recovery (*l*) of the possession of said goods and chattels, or for the sum of            dollars, the value thereof, in case a delivery cannot be had; (*m*) together with            dollars, his damages, (*n*) and for his costs.

614. *For Goods Wrongfully taken from Possession of Plaintiff's Lessee or Bailee; (o)—against the Wrongdoer.*

I. That at the time hereinafter mentioned the plaintiff was, and still is, the owner of [*briefly designate the goods*], of the value of            ; which goods were then in the possession of one M. N., to whom the plaintiff had leased the same for a certain term [*or, with whom the plaintiff had deposited the same for storage, or otherwise, according to the fact*]. (*p*)

II. That on the            day of            , 18            , at            , the defendant wrongfully took said [*goods*] and chattels from the

(*k*) If there are several defendants, the court may adjudge a return of the property in favor of such of the defendants as appear to be entitled to a return, and refuse it as to such of them as are not. *Woodburn v. Chamberlain*, 17 *Barb.*, 446.

(*l*) *Code*, § 277. Where the plaintiff is, at the time of judgment, already in possession of the goods. If he succeeds in the suit he merely takes a judgment to confirm his possession, and for his damages and costs. *Dwight v. Enos*, 9 *N. Y.* (5 *Seld.*), 470.

(*m*) The judgment must be in the alternative, and not in any case absolutely, for the value of the property. *Fitzhugh v. Wiman*, 9 *N. Y.* (5 *Seld.*), 559; *Dwight v. Enos*, *Id.*, 470.

(*n*) This action is based upon a wrongful detention of the property; and such wrongful detention must exist at the commencement of the suit. The object of the action is the recovery of the property in specie; the damages recoverable are merely incident to the action. And if, before suit brought, the defendant unconditionally offers to

restore the property, the object is already attained, and the suit is wholly unnecessary. Such an offer is equivalent to tender before suit brought, and is a good defence to the action. It is otherwise in an action corresponding with the former action of trover for damages for the detention. *Savage v. Perkins*, 11 *How. Pr.*, 17.

It has been held that the purchaser of a chattel cannot, in the same action, seek delivery of possession of it (as in replevin) and damages for the non-delivery; the one being an action for a tort, the other upon contract. *Furniss v. Brown*, 8 *How. Pr.*, 59; *Maxwell v. Farnam*, 7 *Id.*, 236.

(*o*) For averments where the plaintiff claims title under a chattel-mortgage, see Form 558, *ante*, p. 463.

(*p*) 2 *Greenl. on Ev.*, 552, § 561. *Decker v. Matthews*, 12 *N. Y.* (2 *Kern.*), 313; and see 321. The right to possession must be present and immediate. *Redman v. Hendricks*, 1 *Sandf.*, 32; *Wheeler v. Train*, 3 *Pick.*, 255; *Sharp v. Whittenhall*, 3 *Hill*, 576.



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For Goods Wrongfully Taken. For Goods Wrongfully Detained.

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possession of said M. N., and still unjustly detains the same, to plaintiff's damage        dollars.

[III. That before this action said term expired, and thereupon the plaintiff became entitled to the immediate and exclusive possession of said goods.] (q)

*Demand for judgment, as in preceding form.*

615. *For Goods Wrongfully taken from Possession of Plaintiff's Assignor;—against the Wrongdoer.*

I. That at the time hereinafter mentioned one M. N. was lawfully possessed of [*briefly designate the goods*], the property of said M. N., of the value of        dollars.

II. That on the        day of       , 18   , at       , the defendant wrongfully took said [*goods*] from the possession of said M. N., and ever since has unjustly detained the same, to the damage of said M. N.        dollars.

III. That on the        day of       , 18   , said M. N. duly assigned to the plaintiff said [*goods*], and his claim to damages for said taking and detention.

*Demand for judgment, as in Form 614.*

616. *Wrongful Detention of Goods. (r)*

That on, and ever since, the        day of       , 18   , the defendant detained from the plaintiff his [title-deeds of land, called       , in the county of       ]; that is to say [*describe the deeds*].

[*Add demand for judgment.*]

617. *Against One having Derived Possession Innocently.*

I. *As in Form 614 or 615.*

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(q) It seems that the right of possession of a bailee holding a lien, does not preclude the owner from maintaining this action against a third person wrongfully taking the goods from the bailee, and that in such case either owner or bailee may bring the action. See *Fitzhugh v. Wiman*, 9 N. Y. (5 Seld.), 559; *Neff v. Thompson*, 8 Barb., 213, and cases there cited. But it is otherwise of an owner who has divested himself of the right of possession for a definite term, —e. g., by a lease. *Bruce v. Westervelt*, 2 E. D. Smith, 440. It is only in such cases that this allegation is necessary.

(r) This form is from *Chitty's Forms of Pr.*, 96.

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Actions to Recover Possession of Personal Property.

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II. That on the                    day of                    , 18    , at                    , one M. N. [*or*, certain persons to the plaintiff unknown] wrongfully took said goods and chattels from the possession of the plaintiff [*or otherwise*], and unjustly detained the same.

III. That thereafter the same came to the possession of the defendant, who refuses to deliver them to the plaintiff, although, before this action, to wit, on the                    day of                    , 18    , by the plaintiff duly requested so to do; (*s*) but, on the contrary, still unjustly detains them from the plaintiff, to his damage                    dollars.

*Demand for judgment, as in Form 614.*

618. *By Seller, against a Fraudulent Buyer of Goods.* (*t*)

I., II., and III. *as in Form 524, ante*, 431.

IV. That the defendant having so obtained from the plaintiff the possession of said goods, wrongfully detains them from the plaintiff, to his damage                    dollars.

*Demand for judgment, as in Form 614.*

619. *Against a Fraudulent Buyer, and his Transferee.*

I., II., and III. *as in Form 524, ante*, 431.

IV. That the said [*buyer*] afterwards transferred said goods to the defendant Y. Z., who wrongfully detains them from the plaintiff.

V. That on the                    day of                    , 18    , at                    ,

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(*s*) In an action to recover possession of personal property, where the property which is the subject of the action came to the possession of the defendant by delivery from the wrongdoer, and defendant *merely detains* it,—it is necessary for plaintiff to allege that defendant has refused to deliver it up, *upon a demand*. "This is so where the defendant holds as assignee, for the benefit of creditors, from the wrongdoer. *Fuller v. Lewis*, 3 *Abbotts' Pr.*, 383. See, also, *Gurney v. Kenny*, 2 *E. D. Smith*, 132. But in such case, if an actual *wrongful conversion* of the prop-

erty is proved, proof of a demand is unnecessary. *Davison v. Donadi*, 2 *E. D. Smith*, 121; and see *Pringle v. Phillips*, 5 *Sandf.*, 157.

(*t*) It is not necessary to state the facts specially, as in this form. The plaintiff may declare generally, claiming the property as his, and charging that the defendants have become possessed of and wrongfully detain the same, and give the special facts in evidence on the trial to establish the fraud. *Bliss v. Cottle*, 32 *Barb.*, 322; *Hunter v. Hudson River Iron & Machine Co.*, 20 *Barb.*, 493.

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 Actions to Recover Possession of Lands.
 

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the plaintiff demanded of said Y. Z. that he deliver the same to him, but said Y. Z. refused so to do, to his damage dollars.

*Demand for judgment, as in Form 614.*

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## SECTION XXIII.

## COMPLAINTS IN ACTIONS TO RECOVER POSSESSION OF REAL PROPERTY (EJECTMENT). (a)

[In an action to recover possession of lands, the material facts which constitute the cause of action, and necessary to be alleged, are simply the seizin of the plaintiff, and that the defendants are in possession, and withhold possession from him. Adding that the defendant's possession is unlawful, and the plaintiff's title is lawful, is unnecessary. (b)]

But it must appear on the face of the complaint that the plaintiff is out of possession, and that possession is unlawfully withheld from him. While in possession, he cannot maintain his action against another who claims possession or exercises acts of ownership. (c)

The plaintiff need not set out the sources of his title; (d) but if he chooses to set forth his title, he must do so fully; (e) and defendant may take issue on it, and thus confine the proof to the title alleged. (f)

Where defendant is a naked trespasser, a demand of possession, or notice to quit, is unnecessary.] (g)

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(a) As to the authority of an attorney to bring an action of ejectment, see *ante*, 22.

(b) *Payne v. Treadwell*, 16 *Cal.*, 220. An allegation of ownership is a sufficient allegation of fact. *Swan on Pl.*, 156.

A complaint alleging that the defendants were in actual possession, and that the defendants on a certain day entered and ousted the plaintiffs, and still are in possession, is sufficient. *Boles v. Weifenback*, 15 *Cal.*, 144; *Boles v. Cohen*, *Id.*, 150; *Godwin v. Stebbins*, 2 *Id.*, 103; *Leigh Co. v. Independent Ditch Co.*, 8 *Id.*, 323.

Even under the Revised Statutes,—which required plaintiff to aver possession on some day subsequent to the accruing of his title, and a subsequent

ouster,—it was not necessary to prove an actual entry, nor a receipt of profits; but a right of possession at the time of the suit commenced was sufficient (*Sigler v. Van Riper*, 10 *Wend.*, 414), and it is now only necessary to allege what must be proved.

(c) A complaint which shows that the plaintiff is in possession, is bad on demurrer. *Taylor v. Crane*, 15 *How. Pr.*, 358. See, also, *Hulce v. Thompson*, 9 *Id.*, 113; *Budd v. Bingham*, 18 *Barb.*, 494; *Frost v. Duncan*, 19 *Id.*, 560.

(d) *Leigh Co. v. Independent Ditch Co.*, 8 *Cal.*, 323; *Godwin v. Stebbins*, 2 *Id.*, 103; and see *Norris v. Russell*, 5 *Id.*, 249; *Hagley v. West*, 3 *L. J. Ch.*, 63.

(e) *Castro v. Richardson*, 18 *Cal.*, 478

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 620. *General Form.* (h)

I. That the plaintiff is seized in fee [or, for life, \* or other estate] of † the following described premises [designating the same; see next form].

II. That the defendant is in possession thereof, and withholds the same from him.

Wherefore the plaintiff demands judgment :

1. For the possession of the said premises.
2. For        dollars, the plaintiff's damages by the withholding of the same; (i) together with his costs.

(f) *Eagan v. Delaney*, 16 *Cal.*, 85. Or he might move to strike out the allegations, according to the case of *Coryell v. Cain*, *Id.*, 567.

(g) *Godwin v. Stebbins*, 2 *Cal.*, 103.

(h) This form of alleging plaintiff's right and defendant's wrong is supported by *Payne v. Treadwell* (16 *Cal.*, 220),—a well-considered case, in which the authorities under the Code are reviewed. To similar effect are *Walter v. Lockwood*, 23 *Barb.*, 228; *S. C.*, 4 *Abbotts' Pr.*, 307; *Sanders v. Leavy*, 16 *How. Pr.*, 308; *People v. Mayor, &c.*, of N. Y., 28 *Barb.*, 240; *S. C.*, 8 *Abbotts' Pr.*, 7; *Ensign v. Sherman*, 14 *How. Pr.*, 439.

It is the same form as that reported by the Commissioners of the Code, No. 133.

As to an action by two parties claiming in the alternative, see *People v. Mayor, &c.*, of N. Y., 28 *Barb.*, 240; *S. C.*, 8 *Abbotts' Pr.*, 7.

For the requisites of a complaint by a landlord to recover possession of demised premises for non-payment of rent, see *Mayor, &c.*, of N. Y. v. *Campbell*, 18 *Barb.*, 156.

As to the material facts in an action by the purchaser at a sheriff's sale, see *Kellogg v. Kellogg*, 6 *Barb.*, 116; *Brewster v. Striker*, 1 *E. D. Smith*, 321, *Townshend v. Wesson*, 4 *Duer*, 342; and see *Farmers' Bank of Saratoga County v. Merchant*, 13 *How. Pr.*, 10.

(i) It is held in California (in *Payne v. Treadwell*, 16 *Cal.*, 220; *Coryell v. Cain*, *Id.*, 567) that where damages for withholding are claimed, the complaint should state the title of the plaintiff as existing at some prior date, designating it, and as continuing up to the commencement of the action, and the entry of the defendant at some date subsequent to that of the alleged title. (See next form.) That is not, however necessary in this State.

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By Plaintiff who had been in Possession.

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621. *Where the Plaintiff was once in Possession. (j)*

I. That on the                    day of                    , 18 [designating a day after plaintiff's title accrued, and before the defendant's entry], the plaintiff was lawfully possessed, as owner in fee-simple [or, as tenant for her own life, \* or, as tenant for the life of one M. N., or, as tenant for the term of                    years], of † the following described premises in said county (k) [here describe premises in question, designating the number of the lot or township, if any, in which they are situated; if none, stating the names of the last occupants of lands adjoining the same, if any; if there be none, stating the natural boundaries, if any; and if none, describing such premises by metes and bounds, or in some other

(j) This complaint is drawn in pursuance to the directions of the Revised Statutes concerning declarations in ejectment. 2 Rev. Stat., 303. It is not necessary to be adopted under the Code; but it is appropriate, and is conceded to be sufficient, under the Code, in those cases where it comports with the facts. *Ensign v. Sherman*, 13 How. Pr., 35; *Warner v. Nelligar*, 12 Id., 402; and see *Mayor, &c., of N. Y. v. Campbell*, 18 Barb., 156. In *Lawrence v. Wright* (2 Duer, 673), and *Ensign v. Sherman* (13 How. Pr., 35), it was not averred that plaintiff was ever in possession. Several counts, as under the Revised Statutes, are not allowable under the Code. *St. John v. Pierce*, 22 Barb., 362.

In many cases, the averments of the above form will not be true,—e. g., in respect to plaintiff's possession,—and therefore inappropriate under the Code; although it was said, in *Ensign v. Sherman* (13 How. Pr., 35), that the court was by the statute authorized to disregard the variances which might arise by adopting this form in all cases.

Under such a general form, alleging only possession and a wrongful ouster, a holding over by a tenant may be proved (at least under the practice in California). *Garrison v. Sampson*, 15

Cal., 93. But if plaintiff would recover increased damages under the statute, it will be preferable to state the tenancy and refer to the act.

Where a complaint simply set out the plaintiff's title to land, and alleged that the defendant was in wrongful possession, and unjustly withheld it from the plaintiff, and demanded judgment; and the answer set up that defendant held possession under a lease from plaintiff's ancestor, and averred, generally, payment of rent when demanded, and that "all the ordinary and yearly taxes on said lot, which were required to be paid by said lessee, have been fully paid and discharged," and that all the covenants, on the part of the lessee, had been performed; it was *Held*, that the complaint, in connection with the answer setting up the lease, and averring performance of its covenants, was sufficient to admit evidence that defendant had omitted to pay the taxes, and had therefore forfeited the lease. *Garner v. Hannah*, 6 Duer, 262; *Garner v. Manhattan Building Association*, Id., 539.

(k) "In said county" sufficiently refers to the venue of the complaint to designate the county. The residence of the parties need not be alleged. *Doll v. Feller*, 16 Cal., 432.

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Actions to Recover Possession of Real Property.

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*way, so that, from such description, possession of the premises claimed may be delivered*]. (l)

II. That the plaintiff being so possessed thereof, the defendant afterwards, on the            day of           , 18   , (m), entered into said premises [and ousted the plaintiff], (n) and that he unlawfully withholds from the plaintiff the possession thereof, to his damage            dollars. (o)

III. That the value of the use and occupation of said premises since said            day of           , 18   , and while the plaintiff has been excluded therefrom by defendant, is            dollars. (p)

*Demand of possession, damages, and rents.*

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(l) 2 Rev. Stat., 304, § 8. This provision applies to actions under the Code. *Budd v. Bingham*, 18 Barb., 494. Where the premises were described as "about fifty acres, &c.,"—*Held*, that the description was sufficient; but, if necessary, the word "about" might be struck out by way of amendment. *St. John v. Northrup*, 23 Barb., 25. Where the complaint gave a description which embraced nothing whatever, it was held that the complaint was bad, and the defendant might have demurred, or have the complaint dismissed on the trial; and that it was not a case for a motion to make more definite and certain, nor for allowing the plaintiff to proceed on the trial with a view of taking a verdict and afterwards amending. *Budd v. Bingham*, 18 Barb., 494.

As to variance between the allegations and the proof respecting the premises, see *Kellogg v. Kellogg*, 6 Barb., 116; *Wood v. Staniels*, 3 Code R., 152.

A complaint in ejectment may be for separate parcels of land, if both causes of action affect all the parties, and do not require separate places of trial; but they must be separately stated. *Boles v. Cohen*, 15 Cal., 150.

(m) The time of the ouster may be stated thus—[on or about]; for it is not material, especially if no claim is made

for damages. *Collier v. Corbett*, 15 Cal., 183.

(n) A wrongful ouster must be directly alleged. *Watson v. Zimmerman*, 6 Cal., 46. Reciting it is not enough.

(o) Under subdivision 5 of section 167 of the Code, a demand for mesne profits may be made in the action for the recovery of the possession, or a subsequent action may be brought for them (*Holmes v. Davis*, 21 Barb., 265); but in order to be recovered in the action for possession, they must be specially stated as a part of the relief demanded. A demand of damages for the ouster does not cover them. *Livingston v. Tanner*, 12 Barb., 481. But a claim for injuries to the freehold cannot be joined. *Frost v. Duncan*, 19 Barb., 560.

A claim to recover from the defendant the possession of a farm-house and yard, which he had occupied by plaintiff's permission, and a claim for damages for trespass upon the farm, cannot properly be joined in one complaint. *Hulce v. Thompson*, 9 How Pr., 113.

(p) This allegation is sufficient. *Patterson v. Ely*, 19 Cal., 28.

The claim for rents and profits which the plaintiff may set up in an action for lands (*Code of Pro.*, § 167), does not contemplate the specific amounts re-

## By Widow, for Dower.

622. *By Owner of Undivided Interest. (q)*

*As in either preceding form, inserting at the †, one undivided half [or, third, or other] interest in.*

623. *By Widow, for Dower. (r)*

*As in either preceding form, substituting, at the \*, as her reasonable dower as the widow of her husband, the late C. B., of the one undivided third part of the following described premises.*

624. *The Same, Another Form.*

I. That the late A. B. was the husband of the plaintiff at, and for many years next previous to, his death; that he died many years since; and that at the time thereof of his death, and for many years previous thereto, he was seized in fee-simple and in possession of the following described premises [*description as in Form 621*].

II. That the plaintiff is entitled to one undivided third part thereof for her life, as her reasonable dower.

III. That the defendant Y. Z. is in possession of said premises, and wrongfully and unjustly withholds from plaintiff the possession of her said one-third part thereof as her dower.

IV. That the other defendants claim an estate in fee in said premises, as the heirs at law of the said A. B.; that they are the legitimate children of said A. B.

Wherefore, the plaintiff demands judgment that she recover

ceived by the defendant while in wrongful possession, but simply a recovery of damages, as in trespass, or as upon a suggestion for mesne profits in ejectment before the Code. *People v. Mayor, &c., of N. Y.*, 28 *Barb.*, 240; *S. C.*, 8 *Abbotts' Pr.*, 7.

But the rents and profits must be shown by the complaint to be connected with, and arising out of, the wrongful withholding of possession. *Tompkins v. White*, 8 *How. Pr.*, 520.

In Ohio, the demand for rents and profits is deemed a separate cause of actions and should be separately stated

and numbered in the petition. *McKinney v. McKinney*, 8 *O. St.*, 423; and see *Swan on Pl.*, 444.

(q) This form is prescribed by 2 *Rev. Stat.*, 304, § 9.

In an action for the recovery of land, brought against plaintiff's cotenant, it is sufficient for the plaintiff, at the outset, to show that the defendant's entry into possession was under a claim hostile to the rights of the plaintiff,—as, where the entry was under an expired lease. *Clason v. Rankin*, 1 *Duer*, 337.

(r) This form is prescribed by 2 *Rev. Stat.*, 304, § 10.

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Actions to Recover Possession of Real Property.

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possession of one undivided third part of said premises for her own life, against said defendant Y. Z., and that she is entitled to one undivided third part thereof for her own life against all the other defendants, and that she recover her costs of this action.

625. *By Widow and Heirs. (s)*

I. That one M. N. was, on and before the       day of       , 18       , seized in fee and in the lawful possession of the following premises [*describing them, as in Form 621*].

II. That being so seized and possessed, he died, on the day of       , 18       , intestate, leaving C. B., one of the plaintiffs, his widow, and the other plaintiffs, his only heirs at law, him surviving.

III. That the plaintiffs [*heirs*] were, and are, seized in fee and entitled to the possession, subject to the life-estate of the plaintiff [*widow*] in an undivided third part thereof.

IV. That the defendants are wrongfully in possession, and claim a right thereto; and [although on the       day of       , 18       , they were duly requested] they refuse to give up the possession, and unjustly withhold the same from the plaintiffs.

*Demand of relief.*

626. *Another Form, Setting Forth Plaintiff's Title by Deed.*

I. That on the       day of       , 18       , one M. N. was lawfully seized, as owner in fee-simple [*or otherwise*], and in possession of the following described premises [*description as in Form 621*].

II. That being so possessed thereof, on the       day of       , 18       , by his deed, bearing date on that day, he duly conveyed (t) the same [*or state the estate conveyed*] to the plaintiff.

III. That on the       day of       , 18       , the defendant entered into said premises, and that he unlawfully withholds from the plaintiff the possession thereof, to his damage       dollars.

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(s) This form is supported by *Garner v. Manhattan Building Association*, 6 *Duer*, 539.

(t) An allegation that certain officers duly leased certain public lands, im-

ports that the lands were of such description as the statutes authorize them to lease. *People v. Mayor, &c.*, of N. Y., 28 *Barb.*, 240; S. C., 8 *Abbotts' Pr.*, 7.



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 Action to Recover Lands:—Upon Devise,—Inheritance.
 

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627. *Setting Forth Title by Devise.*I. [*As in preceding form.*]

II. That on the            day of           , 18   , the said M. N. died, having by his last will devised to the plaintiff the said premises, (u) which will has been duly proved as a will of real estate in the office of the surrogate of the county of           .

III. [*Continue as above.*]628. *Setting Forth Title by Descent.*

I. That one M. N., late of           , deceased, was, at and before his death, seized in fee-simple of [*here describe the premises*], and was at the time of his death in the possession of said premises.

II. That on the            day of           , 18   , at           , said M. N. died intestate, leaving surviving him these plaintiffs, his only children and heirs at law. (v)

III. That on or about the            day of           , 18   , the defendant unlawfully entered into, and now is in possession and actual occupancy of, said premises, without leave of the plaintiff, or any right or title thereto, and unlawfully withholds possession thereof from the plaintiffs, to their damage            dollars.

[*Demand of relief.*]

(u) This form of alleging a devise is sustained by *Spier v. Robinson*, 9 *How. Pr.*, 325.

An averment that the defendant's ancestor was in his lifetime seized in fee, and in possession of, &c., sufficiently avers the fact of title in him, and a proof of grants to him is admissible under it. *People v. Livingston*, 8 *Barb.*, 253, 276.

(v) The complaint should state that the plaintiff is the heir; but where the

only allegation in this respect was, "that upon the death of W. J., the title of the premises in question descended to F., as sole heir at law, subject, &c.," it was *Held* (the defendant having answered on the merits), that the fact that F. was the sole heir at law of W. J. was sufficiently alleged to admit proof of that fact. *St. John v. Northrup*, 23 *Barb.*, 25. Even if the ancestor left a will, it need not be set out if it did not dispose of the premises. *Id.*

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 Actions Given by Statute.
 

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## SECTION XXIV.

## COMPLAINTS IN ACTIONS GIVEN BY STATUTE.

[In actions founded upon a public statute, it was formerly usual to set forth the statute, or at least to refer to it specifically; and this was held to be necessary where the statute provided a new form of action. (*a*) The plaintiff could not recover upon the common counts, such as for money received, unless the statute specially authorized such pleading; but he must set forth the facts showing a case within the statute, (*b*) and must aver that the defendant's act was against the form of the statute. (*c*)

Under the Code of Procedure, it is sufficient to set forth the facts which bring the case within the statute, without making any express reference to the statute. (*d*) For the court takes judicial notice of the law.

In many cases, however, where an action would lie, as well at common law as under the statute, and for a different measure of relief, or where the statute gives a brief form of pleading, it will be desirable to refer to the statute, in order to avoid ambiguity. (*e*)

The rule dispensing with setting forth the statute applies to public statutes of the State where the action is brought, and to those of the United States; (*f*) and also to cases which are to be governed by the principle of a statute of the mother country, which became a part of the colonial common law. (*g*)

The laws of other States, like foreign laws, must be specially alleged; (*h*) a general averment as to their effect is insufficient; (*i*) and the same rule applies to municipal ordinances or by-laws. (*j*)

In pleading a private statute, or a right derived therefrom, it is sufficient to refer to such statute by its title and the day of its passage. (*k*)

In pleading a statute which is of such a nature that more than a majority

(*a*) *Carris v. Ingalls*, 12 *Wend.*, 70; *Bayard v. Smith*, 17 *Id.*, 88.

(*b*) *Cole v. Smith*, 4 *Johns.*, 193; *Bigelow v. Johnson*, 13 *Id.*, 428; and see *People v. Brooks*, 4 *Den.*, 469.

(*c*) *Lee v. Clarke*, 2 *East*, 333.

(*d*) *Goelet v. Cowdrey*, 1 *Duer*, 132; *Yertore v. Wiswall*, 16 *How. Pr.*, 8; *Brown v. Harmon*, 21 *Barb.*, 508.

This was the rule applied in answers and pleas in equity. *Bogardus v. Trinity Church*, 4 *Paige*, 178; *Van Hook v. Whitlock*, 7 *Id.*, 373.

(*e*) See *ante*, 427, note (*v*); and 471, note (*n*).

Under a statute, providing that in an action for a penalty under its sections it should be lawful to declare generally in debt, &c., stating the section of the act, or the by-law sued on, "stating"

is to be deemed equivalent to "referring to." *City of Utica v. Richardson*, 6 *Hill*, 300.

(*f*) *Jack v. Martin*, 12 *Wend.*, 311, 329; 14 *Id.*, 507.

(*g*) *Bogardus v. Trinity Church*, 4 *Paige*, 178.

(*h*) *Thatcher v. Morris*, 11 *N. Y.* (1 *Kern.*), 437; *Monroe v. Douglass*, 5 *N. Y.* (1 *Seld.*), 447.

(*i*) *Throop v. Hatch*, 3 *Abbotts' Pr.*, 23; *Phinney v. Phinney*, 17 *How. Pr.*, 197.

The objection to a general averment ought not to be available on demurrer, but only by motion.

(*j*) *Harker v. Mayor, &c.*, of *N. Y.*, 17 *Wend.*, 199; *People v. Mayor, &c.*, of *N. Y.*, 7 *How. Pr.*, 81.

(*k*) *Code of Pro.*, § 163.

## Analysis of Section.

of the Legislature is required to pass it, it is enough to allege that it was passed, without averring that such a vote was had. (*l*)

In stating the facts of a case under a statute, care must be taken to make a case clearly within the statute; (*m*) and this may generally be best done by pursuing the words of the statute, adding such particulars of time, place, and value as may be necessary to give definiteness and certainty to the claim; (*n*) although, where the plaintiff is a stranger to the transactions, and defendant may be presumed cognizant of them, generality of statement is permitted (*o*)

It is not necessary to aver a *scienter* in the violation, unless the statute gives the action only for a knowing violation. (*p*)

A distinct proviso, whether in the same section or another, furnishing mere matter of excuse for the defendant, need not be negated; but, generally, an exception incorporated in the very clause should be negated. (*q*) The true test, under the Code, is this: if the burden of proof is on the plaintiff, the matter should be alleged. If it is matter of defence, to be established by the defendant in order to make the exception or proviso avail him, the plaintiff need not notice it.

Numerous violations of a single provision,—*e. g.*, a single subdivision of the section of the statute,—may be alleged in one count. (*r*) But there should be a separate count for violations of a distinct subdivision. (*s*)

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(*l*) *Wolfe v. Supervisors of Richmond*, 11 *Abbotts' Pr.*, 270; S. C., 19 *How. Pr.*, 370.

(*m*) The objection that it appeared by the bill that the complainant had not complied with the directions of the statute, might in chancery be raised at any stage of the cause. *Manning v. Merritt, Clarke*, 98.

(*n*) See *Thomas v. People*, 19 *Wend.*, 480.

(*o*) *Gaffney v. Colvill*, 6 *Hill*, 567.

(*p*) *Bayard v. Smith*, 17 *Wend.*, 88; *Gaffney v. Colvill*, 6 *Hill*, 567.

(*q*) *Bennet v. Hurd*, 3 *Johns.*, 438; *Teel v. Fonda*, 4 *Id.*, 304; *Hart v. Cleis*, 8 *Id.*, 41; *Sheldon v. Clark*, 1 *Id.*, 513; *Burr v. Van Buskirk*, 3 *Cow.*, 263; *Foster v. Hazen*, 12 *Barb.*, 547; and see

*First Baptist Church v. Utica & Schenectady R. R. Co.*, 6 *Id.*, 313.

(*r*) *Longworthy v. Knapp*, 4 *Abbotts' Pr.*, 115; *People v. McFadden*, 13 *Wend.*, 396; *Gaffney v. Colvill*, 6 *Hill*, 567.

(*s*) *Gaffney v. Colvill*, 6 *Hill*, 567.

Where there are separate statutes, giving a different measure of damages for the same wrongs, it has been held that the plaintiff must elect (*Sipperly v. Troy & Boston R. R. Co.*, 9 *How. Pr.*, 83); but it seems more consonant with the present practice, to regard the wrong, and not the statute, as the cause of action, and allow the plaintiff to state the facts, and recover under either statute according to the proof at the trial.

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 Actions Given by Statute.
 

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## I. MECHANICS' LIEN. (t)

629. *By Contractor, for Building Materials.*

The complaint of the plaintiff, filed pursuant to an order of this court, (u) made on the       day of       , 18       , shows:

I. That on the       day of       , 18       , at       , this plaintiff, by virtue of a contract with the defendant, sold and delivered to the defendant certain building materials consisting of       , of the value of       dollars; the quantity and value of which is set forth in the bill of particulars herein.

II. That by the terms of said contract and sale, the said sum became due on the       day of       , 18       , but the defendant has not paid the same. (v)

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(t) These forms are drawn with reference to the Mechanics' Lien Law applicable to the city and county of New York; but will be found useful precedents in cases under any of the lien acts.

The complaint in these cases is subject to the rules governing pleadings in other actions. *Duffy v. McManus*, 3 *E. D. Smith*, 657; *S. C.*, 4 *Abbotts' Pr.* 432.

(u) The pleadings in these causes are filed pursuant to order of court. The statute provides only for the joining of issues; which, for convenience, is done, by order of court, through the instrumentality of written pleadings.

(v) It is not enough to recite the notice of lien by way of showing the facts relied on. The complaint must aver independently the facts constituting the grounds of the alleged claim, and show-

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By Contractor;—to Foreclose Mechanics' Lien.

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III. That the said materials were used in erecting a building and appurtenances upon the following described premises, to wit: [*describe premises*]. (*w*)

IV. That the said premises were, at the time of making said contract of sale, and until the filing the notice of lien hereinafter mentioned, the property of the defendant.

V. That on the                day of               , 18   , and after performance of said contract, (*x*) the plaintiff duly filed with the clerk of the city and county of New York [*or*, clerk of county], a notice of lien claimed upon said premises for the indebtedness aforesaid; which notice was duly verified, and specified the amount of the claim as above stated, and specified the defendant as the person against whom the claim was made, and as the owner of said premises, which were therein described by the street [and number] of the building. (*y*)

Wherefore the plaintiff prays judgment, directing a sale of the interest of the defendant, in the premises, building, and appurtenances above described, to the extent of the right of defendant on the                day of               , 18   , [*date of filing the notice of lien*], and directing that the proceeds of such sale be applied to the payment of the costs of these proceedings, and to the payment of this plaintiff's claim aforesaid [and that the residue of such proceeds, if any, be paid to the clerk of the city and county of New York, to abide the further order of the court]; and that if the proceeds of such sale shall not be suffi-

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ing the plaintiff's right to the remedy. *Duffy v. McManus*, 3 *E. D. Smith*, 657; *S. C.*, 4 *Abbotts' Pr.*, 432.

(*w*) The complaint is demurrable, unless it describes the premises sufficiently to enable the sheriff to determine beyond a doubt the premises to be sold; and the street-number of the premises should be shown, or the plaintiff's ignorance of it averred. *Duffy v. McManus*, 3 *E. D. Smith*, 657; *S. C.*, 4 *Abbotts' Pr.*, 432.

(*x*) The complaint must aver performance of the contract before the filing the notice of lien. So much of the act of 1844 as allowed a contractor to acquire a lien before performance, is

repealed by the act of 1851. *Jaques v. Morris*, 2 *E. D. Smith*, 639. Hence, a complaint which only avers performance "before the commencement of this action," is defective. *Ib.*

(*y*) The contents of the notice should be stated, so as to show that a lien was created; this being essential to the cause of action.

The complaint must show that the complainant has taken the requisite steps to create a lien. An ordinary complaint for work and labor merely, may be set aside on motion. *So held*, in a proceeding by the original contractor *Foster v. Poillon*, 2 *E. D. Smith*, 556, *Cronkright v. Thomson*, 1 *Id.*, 661.

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cient to discharge the costs and claim aforesaid, this plaintiff have leave to docket a transcript of judgment against the defendant for such sum as may remain due.

630. *By Sub-contractor, against Owner and Contractor, for Labor.*

The complaint of the plaintiff, filed pursuant to an order of this court, made on the       day of       , 18       , shows:

I. That on the       day of       , 18       , the defendant W. X. [*contractor*] entered into a contract with the defendant Y. Z. [*owner*] for the erection of a building and appurtenances upon the premises hereinafter described; by the terms of which contract it was agreed that [*state substance of terms of contract; or say, which contract was as follows, to wit: and give copy*].

II. [*State performance of contract by contractor so far as to show indebtedness of owner to contractor, and aver such indebtedness, specifying its amount.*](2)

III. That between the       day of       , 18       , and the       day of       , 18       , the plaintiff, in pursuance of an agreement theretofore entered into by him with the defendant W. X. [*contractor*], and in conformity with the terms of the contract above mentioned, performed [*state kind of labor performed*], to the value of       dollars, the nature, amount, and value of which labor are set forth in the bill of particulars herein.

IV. That by the terms of the agreement between the plaintiff and the defendant W. X. [*contractor*], said sum became due on the       day of       , 18       , but he has not paid the same.

V. That said labor was performed in erecting a building and appurtenances upon the following described premises: [*describe premises*].

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(2) Where the proceeding is by a sub-contractor, his complaint must aver that the labor or materials were furnished in conformity with the contract between the owner and the original contractor. If it fails to show this, it may be required to be amended. *Brodcrick v. Poillon*, 2 *E. D. Smith*, 554

If it does not show this, it shows no right of action. *Quinn v. Mayor, &c.*, of N. Y., 2 *E. D. Smith*, 558. See, also, *Cunningham v. Jones*, 4 *Abbotts' Pr.*, 433; *Doughty v. Devlin*, 1 *E. D. Smith*, 625; *Kennedy v. Paine*, *Id.*, 651; *Cronk v. Whittaker*, *Id.*, 647; *Hauptman v. Halsey*, *Id.* 668.

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By Sub-contractor ;—to Foreclose Mechanics' Lien.

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VI. That the said premises were, at the time when said labor was performed, and until the filing the notice of lien hereinafter mentioned, the property of the defendant Y. Z. [owner].

VI. That on the            day of           , 18   , the plaintiff duly filed with the clerk of the city and county of New York [or, clerk of            county], a notice of lien claimed upon said premises for the indebtedness aforesaid, which notice was duly verified, and specified the amount of the claim as above stated, and specified the defendant [owner's name] as the person against whom the claim was made, and as the owner of said premises, which were therein described by the street [and number] of the building.

Wherefore the plaintiff prays judgment directing a sale of the interest of the defendant Y. Z. [owner] in the premises, building, and appurtenances above described, to the extent of the right of said defendant on the            day of           , 18   , [date of filing the notice of lien], and directing that the proceeds of such sale be applied to the payment of the costs of these proceedings, and to the payment of the plaintiff's claim aforesaid [and that the residue of such proceeds, if any, be paid to the clerk of the city and county of New York, to abide the further order of the court]; and prays judgment, in addition, against the defendant Y. Z. [contractor] (a) for the sum of            dollars [the amount of the plaintiff's claim], with interest from the            day of           , 18   , together with the costs of these proceedings.

### 631. Allegation of Fraudulent Lien. (b)

I. That on the            day of           , 18   , the defendant Y. Z., conspiring with the other defendants before named to defraud the plaintiff, filed a notice of lien against said W. as owner, and said X. as the person against whom said claim is made, upon the said building and premises, and for the sum of            dollars.

II. That neither the said sum, nor any sum whatsoever, was or at any time will be owing to said Y. Z., as in said notice of

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(a) Authorized by *Laws of 1855*, ch. 404, § 5; applicable to the city and county of New York. (b) This form is from *Nott's N. Y. Lien L.*, 256.

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lien pretended; and that said Y. Z. has been fully paid for all labor he has done or caused to be done upon said building and appurtenances, and he has no legal or just claim against the defendant X., or any other person for any labor done or materials furnished in or about the same; and that said lien, if allowed to stand, would wholly defeat the claim and lien of the plaintiff.

*Insert, in demand of relief:* and that the lien filed by said Y. Z., on the            day of           , 18   , be adjudged fraudulent and void, and be set aside; and that said Y. Z. pay the costs of this action.

## II. INDIVIDUAL LIABILITY OF CORPORATORS. (c)

### 632. *Against Stockholder. (d)*

I. That at the times hereinafter mentioned, the            Company was a corporation created by and under the laws of this State, organized pursuant to [*here designate charter,—e. g., thus,—*] an act entitled "An Act to authorize the formation of Corporations for Manufacturing, Mining, Mechanical, and Chemical purposes," passed February 17, 1848, and the acts amending the same. (e)

II. That on the            day of           , 18   , and before the

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(c) An action to enforce the *personal* liability of a corporator, though commonly spoken of as founded upon a statutory liability, is, in many cases at least, to be considered as founded on that vestige of the relation of partnership between the members of the company which the charter or general act failed to remove. *Corning v. McCullough*, 1 *N. Y. (1 Comst.)*, 47; *Conant v. Van Schaick*, 24 *Barb.*, 87; *Simonson v. Spencer*, 15 *Wend.*, 548; *Bailey v. Bancker*, 3 *Hill*, 188.

As to the personal liability of the trustees to the corporation or a stockholder for an abuse of their trust, and the requisites of pleading in such cases, see *Robinson v. Smith*, 3 *Paige*, 222; *Cunningham v. Pell*, 5 *Id.*, 607; *Austin v. Daniels*, 4 *Den.*, 299; *Scott v. De-*

*peyster*, 1 *Edw.*, 513; *Franklin Fire Ins. Co. v. Jenkins*, 3 *Wend.*, 130; *Gaffney v. Colvill*, 6 *Hill*, 567; *Cazeaux v. Mali*, 25 *Barb.*, 578.

For complaints in actions to dissolve corporations, or to restrain them for insolvency, see Section XXXII., *infra*.

As to whether the summons should be for relief, or for a money demand on contract, compare *Peckham v. Smith*, 9 *How. Pr.*, 436; and *Simonson v. Spencer*, 15 *Wend.*, 548; *Bullard v. Bell*, 1 *Mas.*, 243; *People v. Bennett*, 5 *Abbotts' Pr.*, 384; *Durant v. Gardner*, 10 *Id.*, 445.

(d) This form is supported by *Herkimer County Bank v. Furman*, 17 *Barb.*, 116; *Witherhead v. Allen*, 28 *Id.*, 661.

(e) See *Averments of Incorporation* suited to other cases, *ante*, pp. 133-139.



## Against Stockholders of Corporations.

whole amount of capital stock fixed and limited by said company had been paid in [or, before a certificate, &c., had been made and recorded as prescribed by law], (f) said company, by their agent duly authorized thereto, made their promissory note in writing, dated on that day, and thereby promised to pay to the plaintiff, or order,                  dollars                  months after said date, for value received; (g) and delivered it to plaintiff, which remains unpaid [*or state other cause of action on a debt incurred by the company before full payment of stock, or upon a contract made before full payment of stock, and show that it was to be paid within the year*] (h)

III. That on the                  day of                  , 18                  , in an action in the                  Court for the county of                  [or, before M. N., a justice of the peace in and for the town of                  ], brought by this plaintiff within one year after said debt became due, to recover the same from said company, this plaintiff recovered judgment, duly given by said court [or, justice] against said

(f) There are many other grounds of personal liability of stockholders, varying according to various acts and charters. The above form will serve to indicate the proper frame of the complaint in different cases that may arise.

(g) In an action to charge stockholders of a corporation with personal liability for a note made by the corporation, if the complaint refers to a charter which shows a corporation competent to make notes,—*e. g.*, a trading company,—it is unnecessary for the plaintiff to aver the facts showing for what the note was given. If it was not within their power, this must be pleaded as defence. *Gebhard v. Eastman*, 7 *Minn.*, 56.

(h) The cause of action may be stated in the same way as it would be in a complaint against the corporation; though less particularity will be allowable. Thus it was held before the Code, that in an action of debt against a stockholder to recover on his statute liability for the indebtedness of the corporation, a general *indebitatus* count

was sufficient, alleging that the company was indebted, &c., for, &c., and payment had been refused, although the debt of the company arose under a special contract. *Simonson v. Spencer*, 15 *Wend.*, 548.

The plaintiff must prove not only a judgment and execution unsatisfied, but also that the judgment was upon a debt for which the corporators were individually liable. *Conant v. Van Schaick*, 24 *Barb.*, 87. Liability for "debts" does not include a claim for damages for negligence. *Heacock v. Sherman*, 14 *Wend.*, 58.

In an action founded upon section 10 of the general railroad act (*Laus* of 1850, 215), which makes stockholders liable for debts due from such corporations to their laborers or servants, the complaint must expressly aver that the plaintiff or his assignor was a laborer or a servant of the company, and that the claim accrued to him in that capacity. A mere averment that he did work and labor for it, is insufficient. *Boutwell v. Townsend*, 37 *Barb.* 205.

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company, for            dollars, being            dollars, the amount due thereon with interest, besides            dollars costs. (i)

IV. That execution thereon was thereafter duly issued against said company, and returned wholly unsatisfied [or, unsatisfied except as to, &c.] (j)

V. That at the time said debt was contracted [or, said contract was made], the defendant (k) was a stockholder (l) [or, on the            day of           , 18           , and before the whole amount of capital stock fixed and limited by said company had been paid in, or; before a certificate, &c., as above, the defendant became a stockholder] of said company, holding stock therein to the amount of            dollars, (m) being            shares of the par value of            dollars each; and that he still is such stockholder therein [or, and that he continued to be such stockholder until within two years before this action].

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(i) As to whether the stockholder is liable for the costs of the judgment against the company, compare *Bailey v. Bancker*, 3 *Hill*, 188; *Andrews v. Murray*, 9 *Abbotts' Pr.*, 8.

(j) It is not necessary to aver that the corporation was insolvent, except in those cases in which the charter places the liability subject to the existence of such insolvency, or requires the creditor to exhaust his remedy against the corporation before proceeding against the stockholders; in other cases, when a debt is not paid at maturity, the creditor may proceed to collect his claim either from the corporation, or those who by their charter are made responsible for the debts without any limitation. *Perkins v. Church*, 31 *Barb.*, 84.

If it appears from the complaint filed by a creditor of a manufacturing corporation in the county of Herkimer, against a stockholder, to enforce the individual liability of the latter, that the company was dissolved under the act of April 16, 1852, that fact will be fatal to the action. But if the complaint merely alleges the dissolution of the corporation, without showing that

it was dissolved under that act, the court will not, on demurrer, assume that it was. *Herkimer County Bank v. Furman*, 17 *Barb.*, 116.

(k) As to when the corporation should be joined as a party, see *Bogardus v. Rosendale Manufacturing Co.*, 7 *N. Y.* (3 *Seld.*), 147; *Masters v. Rossie Lead Mining Co.*, 2 *Sandf. Ch.*, 301. The omission to join it is not ground of demurrer. *Perkins v. Church*, 31 *Barb.*, 84.

(l) The complaint must show that the defendants were such stockholders at the time the debt was contracted. *Young v. N. Y. & Liverpool Steamship Co.*, 15 *Abbotts' Pr.*, 69; affirming *S. C.*, 19 *Id.*, 239; and see *Tracy v. Yates*, 18 *Barb.*, 152.

An averment in the words of the charter creating such liability, that defendant was a stockholder at the time of the original contracting of the debt, is sufficient. *Freeland v. McCullough*, 1 *Den.*, 414.

(m) In pleading the liability of a stockholder under the Laws of 1848, ch. 40, § 10,—which provides that stockholders, in manufacturing corporations allowed to be formed by that act, shall

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 Against Officers of Corporation.
 

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633. *Against Trustees, for Neglect to File Report.*

I. That at the time hereinafter mentioned, the defendants were trustees (*n*) of the                      Company.

II. That at the times hereinafter mentioned, said company were a corporation organized pursuant to an act of the Legislature of this State, entitled, "An Act to authorize the formation of Corporations for Manufacturing, Mining, Mechanical, or Chemical purposes," passed February 17, 1848, and the acts amending the same.

III. That on the                      day of                      , 18                      , and before the time for filing the annual report hereinafter mentioned [*or*, after the time for filing the annual report hereinafter mentioned, and before it was filed], (*o*) said company became indebted to the plaintiff in the sum of                      dollars upon an account for work, labor, and services rendered by the plaintiff and his servants to said company at their request, and for money paid by him to the use of said company at their request, in advertising in various newspapers in the United States and Canada, the goods manufactured and offered for sale by the said corporation [*or state other indebtedness*], and although the same became due and payable on said day [*or*, on the                      day of                      , 18                      ], no part thereof has been paid.

IV. That the said company did not, within twenty days from the first day of January, 18                      , make and publish [*nor have they at any time whatever since their organization made and published*] a report as required by law in such case made and provided, verified by the oath of the president or secretary thereof, and file the same in the office of the clerk of the county where it is required by law to be filed; nor did they

be liable, in case the capital is not paid in, for debts of the company, in an amount equal to the amount of stock held,—it must be averred that such stockholder held an amount of stock equal to the amount for which he is sought to be held liable. *Chambers v. Lewis*, 16 *Abbotts' Pr.*, 433.

(*n*) It is better to allege this explicitly; though it is sufficient if the fact can be gathered from other allegations.

*Andrews v. Murray*, 9 *Abbotts' Pr.*, 8. *Gwynne v. Kettel*, not reported.

(*o*) In pleading the liability of a trustee under section 12 of the act, it must be averred that the debt was existing at the time of the failure to publish the annual certificate, or that it was contracted afterwards, before such report was published. *Chambers v. Lewis*, 16 *Abbotts' Pr.*, 433.

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make, publish, sign, cause to be verified, and file, any such report whatsoever, until after the [*designating time when it is alleged that the debt was contracted*], [nor have they either made, published, signed, verified, or caused to be verified, or filed any such report, as by law required; but wholly failed to do so.]

634. *Against the Trustees of a Dissolved Corporation.* (p)

The plaintiff complains, on behalf of himself and all other creditors of the                      Company who may come in and contribute to the expenses of this action, and alleges:

I. That the                      Company was duly incorporated on the day of                      , 18                      , under the "Act relative to Incorporations for Manufacturing purposes," passed March 22, 1811, and the acts amending the same; and thereafter carried on business at the town [*or, city*] of                      , in                      county.

II. [*State a cause of action against the company.*]

III. That on the                      day of                      , 18                      , the trustees of the said company passed a resolution, of which a copy is hereto annexed, pursuant to an act entitled "An Act to facilitate the Dissolution of Manufacturing Corporations in the County of Herkimer, and to secure the Payment of their Debts without preference," passed April 16, 1852 [*or, allege other acts amount-*

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(p) This is the form recommended by the *Commissioners of the Code*, No. 155.

Where one who is a stockholder in a corporation, the stockholders in which have become personally liable for the corporate debts, and who is also a judgment-creditor of the corporation to an amount exceeding his liability as stockholder, brings an action against the corporation, its other stockholders, and its other creditors, to ascertain the rights and liabilities of the parties, and to set off his liability against his judgment, and to restrain other litigation among the parties, and payments by the stockholders on their individual liability meanwhile, his complaint should show that the plaintiffs were stockholders during all the time when the

demands of the different creditors accrued. The time when the different stockholders acquired their stock, and the time when the demands of the creditors who are made defendants accrued, should be stated, or sufficient to show that all the defendants who are stockholders are liable to contribute to the payment of the demands of some of the creditors, and that some of the stockholders are liable to contribute to all the demands of all the creditors.

It must also show the grounds on which the stockholders are individually liable for the corporate debts. An allegation that the judgment-creditors claim that the stock was not all paid in, &c., is not sufficient. *Geery v. N. Y. & Liverpool Steamship Co.*, 12 *Abbotts Pr.*, 268.

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 Against Officers of Corporation.
 

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ing to a dissolution which vests the assets in the officers as trustees].

IV. That the defendants were the trustees of the said company at the time of passing the said resolution.

V. That the defendants have received a large amount of money and other property belonging to the said company, but have refused to pay the claim of the plaintiff.

Wherefore, the plaintiff demands judgment:

1. That the defendants account, under the direction of the court, for the property received by them as aforesaid;

2. For the payment to him of                      dollars, with interest from the                      day of                      , 18                      [and costs], out of the funds in possession of the defendants, or which they may collect;

3. That the defendants proceed, without delay, to discharge the trusts devolved upon them in the premises.

635. *Averment of Indebtedness beyond Capital.*

That the said company has become indebted to various persons to an amount exceeding the amount of the capital stock of said company, by                      dollars, (q) with the consent of said plaintiff, as a trustee of said company.

636. *Averment where Debt is a Judgment for Costs. (r)*

That at the city of New York, on or about the                      day of                      , 18                      , the said company, by a resolution of its trustees, of whom the defendant was one, instituted an action in the                      Court of                      , against the plaintiff; and thereupon such proceedings were had, that the said court, on the day of                      , in the year 18                      , dismissed said complaint, with costs; and that said costs were afterwards, on the                      day of                      , 18                      , duly adjusted and taxed, at the sum of                      dollars, and judgment was then entered therefor in the office of the clerk of                      county; which judgment remains unpaid.

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(q) It must be averred that the excess of debt over the capital was equal to, or exceeded the amount for which defendant is sought to be held liable. Chambers v. Lewis, 16 Abbotts' Pr., 433.  
(r) This form is supported by Andrews v. Murray, 9 Abbotts' Pr., 8.

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 Actions Given by Statute.
 

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637. *Against Director of Insurance Company, on the Ground of Unlawful Dividends and Transfers of Assets.* (s)

I. That from the            day of           , 18   , to the            day of           , 18   , the International Insurance Company was a corporation existing by virtue of the laws of the State of New York, and authorized by law to make insurances.

II. That during the said time the said corporation made insurances for plaintiff, in the sum of \$6,000, on two vessels, viz., \$4,000 on a vessel named the "*Driver*," and \$2,000 on a vessel named the "*Racer*;" that on said vessels respectively there were total losses, and the said corporation on said insurance became liable, and now is liable to pay to the plaintiff the said sums of \$4,000 and \$2,000, no part of which has ever been paid; and the plaintiff, at the time of the acts hereinafter mentioned, was and still is a creditor of said company, and the defendant then was a trustee of said company.

III. That at a meeting of the board of trustees of said corporation, at which defendant was present, during the time aforesaid, the defendant, with the other trustees, made dividends to the stockholders of the said corporation, which dividends were not made from the surplus profits arising from the business of said corporation.

IV. That at a meeting of the board of trustees of said corporation, at which the defendant was present, and when the said corporation was insolvent and in contemplation of insolvency, the defendant, with the other trustees, made conveyances, assignments, and transfers of the assets and property of said corporation, with the intent of giving a preference to particular creditors of said corporation over other creditors of said company. (t)

(s) This form is from *Ogden v. Rollo* (13 *Abbotts' Pr.*, 300; reversing S. C., 9 *Id.*, 8, *note*), modified to obviate the objections there made.

(t) The complaint is not to be deemed as uniting several causes of action because it sets forth several grounds, on either of which the defendants would be liable. *Durant v. Gardner*, 10 *Abbotts' Pr.*, 445; S. C., 19 *How. Pr.*, 94.

It has, however, been held that when

two different statutes severally authorize an action upon a certain state of facts, the arising of such state of facts constitutes but one cause of action; and a plaintiff must elect which statute he will proceed under; and cannot complain upon the same facts in two counts, one under each statute. *Sippery v. Troy & Boston R. R. Co.*, 9 *How. Pr.*, 83.

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 Against Next of Kin or Legatees.
 

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V. That the plaintiff is, and was, at the time of the aforesaid acts, a creditor of said corporation for the sum of \$6,000, as aforesaid. That in consequence of the wrongful acts and violations of law of the defendant, with the other directors of said corporation hereinbefore mentioned, the said corporation, prior to said       day of       , and while the plaintiff was such creditor, became, and now is, wholly insolvent; (u) that he has sustained loss by reason thereof in the sum of       dollars.

### III. BY CREDITOR OF DECEASED PERSON.

#### 638. *Against Next of Kin.* (v)

I. [*State facts showing a debt of the decedent, due and still unpaid.*]

II. That on the       day of       , 18       , at       , said [*decedent*] died intestate; and that on the       day of       , 18       , letters of administration upon the estate of said [*decedent*] were granted to one M. N., by an order duly made by the surrogate of the county of       , of this State, appointing said M. N. administrator of all the goods, chattels, and credits which were of said deceased [*or, allege death, leaving a will, &c., as in next form*].

III. That before the commencement of this action said administrator [*or, executor*] paid over assets of the estate to the defendant, who is one of the next of kin [*or, to the defendants, who are the next of kin*] of the deceased, amounting to the sum of       dollars.

#### 639. *Against Legatee.* (w)

I. [*State facts showing a debt of the decedent, due and still unpaid.*]

II. That on the       day of       , 18       , at       , said [*decedent*] died, leaving a last will and testament duly made, by

(u) It should appear that the plaintiff was a creditor of the corporation at the time the wrongful acts and violation of law complained of are alleged to have been done or committed. Og-

den v. Rollo, 13 *Abbotts' Pr.* 300; reversing S. C., 9 *Id.*, 8, *note*.

(v) These actions are regulated by 2 *Rev. Stat.*, 450, § 23.

(w) These actions are regulated by 2 *Rev. Stat.*, 450, § 26.

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which one M. N. was appointed sole executor thereof; and that on the       day of       , 18       , said will was duly proved and admitted to probate in the office of the surrogate of the county of       , and letters-testamentary thereupon were thereafter duly issued and granted to said M. N. by said surrogate.

III. That said will contained the following legacy to the defendant [*copy of the clause of the will, or*: That by said will the said [*decedent*] bequeathed a legacy of       dollars to the defendant].

IV. That before the commencement of this action said executor paid over to the defendant, as such legatee, the amount of said legacy [*or*,       dollars, being part of the amount of said legacy] out of the assets of said estate.

V. That no assets have been delivered by the executor to any of the next of kin of the deceased [except assets to the value of       dollars; and the value of said assets so delivered has been recovered from the next of kin by one M. N., a creditor of the decedent; *or say*, and the value of said assets so delivered is not sufficient to satisfy the plaintiff's demand].

#### 640. *Against Heir. (x)*

I. [*State facts showing a debt of the decedent, due and still unpaid.*] (*y*)

II. That on the       day of       , 18       , at       , said

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(*x*) These actions are regulated by 2 *Rev. Stat.*, 452, § 32, &c., as amended by the *Laws of 1859*, 293, ch. 110.

(*y*) The statute supersedes the common-law rules as to the liability of the heir on the covenant of his ancestor, and it is now necessary in all cases to allege the special facts on which the plaintiff's right under the statute to recover, depends. *Gere v. Clarke*, 6 *Hill*, 350; and see *Mersereau v. Ryerss*, 3 *N. Y. (3 Comst.)*, 261. It is not necessary to aver a debt due in the ancestor's lifetime. *Parsons v. Parsons*, 5 *Cow.*, 476. The liability of the heirs is joint, not several. *Laws of 1837*, ch. 460, § 73; same statute, 2 *Rev. Stat.*, 454. So of the liability of the devisees. *Id.*, 456, § 60.

But it was held, before the Code, that several heirs or devisees were not joint-debtors within the provisions of the Revised Statutes, respecting judgments in suits against joint-debtors where a part only of the defendants were served. *Van Deusen v. Brower*, 6 *Cow.*, 50; *Whitaker v. Young*, 2 *Id.* 569; *Schermerhorn v. Barhydt*, 9 *Paige*, 28; and see *Jackson v. Hoag*, 6 *Johns.*, 59; *Purdy v. Doyle*, 1 *Paige*, 558.

The heirs and personal representatives cannot be joined. *Stuart v. Kissam*, 11 *Barb.*, 271, and cases there cited. And it was held in *Gere v. Clarke* (6 *Hill*, 350), that the defendant cannot, in one count, be charged both as heir and as next of kin.



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 Against Heir, for Debt of his Ancestor.
 

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[*decedent*], being owner in fee [*or otherwise*] of the property hereinafter described, died intestate [as to said property]; and that more than three years before this action, to wit, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, letters of administration upon the estate of said [*decedent*] were duly issued and granted to one M. N. by the surrogate of the county of \_\_\_\_\_, of this State, appointing said M. N. administrator of all the goods, chattels, and credits which were of said deceased [*or, if he left a will, the probate and issue of letters may be alleged, as in the preceding form*].

III. That the defendant is the sole heir [*or, defendants are the only heirs*] of said deceased, and that the following described premises descended from the deceased to him [them] as such: [*description of premises.*] (2)

IV. That the personal assets of said [*decedent*] were not sufficient to pay and discharge the plaintiff's demand. (a)

*Or*, IV. That the said [*decedent*] left no personal assets within this State to be administered [except a small amount, in value not exceeding \_\_\_\_\_ dollars, which is not sufficient to pay and discharge the plaintiff's demand.] (b)

*Or*, IV. That after due proceedings before the surrogate's court of the county of \_\_\_\_\_, by [*stating briefly what*], the plaintiff has been unable to collect his said debt [except the sum of \_\_\_\_\_ dollars] from the personal representatives of said [*decedent, or, from his next of kin, or, legatees*].

Wherefore, the plaintiff demands judgment that said premises be sold, and the sum of \_\_\_\_\_ dollars, with interest thereon

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(2) The premises should be described with convenient certainty, although, as the description is a matter resting more particularly within the knowledge of the defendant, it may be considered that a neglect to describe them does not prejudice him. See *Sharp v. Sharp*, 3 *Wend.*, 278. And it was held in *Parsons v. Bowne* (7 *Paige*, 354), that if the complainant was unable to ascertain and specify the lands which have come to the defendants from the deceased, he should state that fact in his bill, and call upon the heirs

and devisees to discover the lands devised or descended to them respectively, and the incumbrances thereon, to enable him to reach such lands.

(a) *Roe v. Swezey*, 10 *Barb.*, 247; *Mersereau v. Ryerss*, 3 *N.Y.* (3 *Comst.*), 261.

Where the defendant is not sued as heir, but on a special promise, no averment of assets is necessary. *Elting v. Vanderlyn*, 4 *Johns.*, 237.

(b) 2 *Rev. Stat.*, 452, § 33, as amended by the *Laws of 1859*, 293, ch. 110. *Hollister v. Hollister*, 10 *How. Pr.*, 532

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from the            day of            , together with costs of this action, be paid to the plaintiff out of the proceeds thereof.

641. *Against Devisees. (c)*

I. and II. [*as in Form 639*].

III. That said will contained the following devise to the defendants [*copy of the clause of the will*], and that said devised property is bounded and described as follows [*description of premises*].

Or, III. That by said will the testator devised to the defendants the following described premises [*description*].

[*Continue as in preceding form.*]

642. *Against Heir or Devisee, where he has Aliened the Land.*

*As in either preceding form, adding :*

V. That the defendant did, on the            day of            , 18    , convey said mentioned premises to one O. P., and that the premises so conveyed by him were reasonably worth            dollars.

Wherefore the plaintiff demands judgment for [*the amount of the debt, but not exceeding the value of the premises*], &c.

IV. BY PERSONAL REPRESENTATIVE OF DECEASED PERSON, FOR  
WRONG OR NEGLIGENCE CAUSING DEATH. (*d*)

643. *Against Railroad Company.*

I. That the defendants are a corporation created by and under the laws of this State, organized pursuant to an act of the Legislature, entitled, "An Act to Authorize the Formation of Railroad Corporations, and to Regulate the same,"

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(*c*) In suing the heirs and devisees jointly, it must be averred that the real estate descended is insufficient. *Schermerhorn v. Barhydt*, 9 *Paige*, 28. To similar effect, *Wambaugh v. Gates*, 1 *How. App. Cas.*, 247; affirming *S. C.*, 11 *Paige*, 505.

(*d*) *Laws of 1849*, 388, ch. 256.

Both corporations and individuals

are liable, under this statute, for wrongful acts, neglects, and defaults, intentional or unintentional, that result in death. *Baker v. Bailey*, 16 *Barb.*, 54. It is held that this action may be maintained where there is a widow only surviving, or next of kin only. *Safford v. Drew*, 3 *Duer*, 627, 640.

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For Injuries Resulting in Death.

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passed April 2d, 1850 [*or state title, &c., of special charter*], and the acts amending the same; and at the times hereinafter mentioned, being such corporation, were common carriers of passengers for hire between the places hereinafter mentioned.

II. That on the            day of           , 18   , said defendants received one M. N. into their cars for the purpose of conveying him therein as a passenger from            to            [for            dollars paid to them by said M. N.].

III. That the defendants so negligently and unskilfully conducted themselves in the management of said train of cars, that through the negligence of the defendants and their servants in guiding the said train of cars, and in not keeping the track of said railroad in proper condition, the said train, while proceeding from            to           , was thrown from the track, and the car in which the said M. N. then was was thrown down an embankment, and the said M. N. was thereby killed [*or, thereby so injured as to cause his death, (e) or state other accident, according to the fact. See forms in Section XV., ante, 412; Section XVIII., ante, 546.*]

IV. That said M. N. left no widow, (*f*) and that his only next of kin is one O. N. his daughter, a child of the age of            years, who was dependent upon the deceased for her support, nurture, and education, and has been otherwise injured by his death, to her damage five thousand dollars. (*g*)

V. [*Allege plaintiff's appointment as administrator or executor, as in following form, or as in Forms 185 or 187, ante, 140.*]

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(*e*) *Brown v. Buffalo & State Line R. Co.*, 22 *N. Y.*, 191.

(*f*) As to whether the husband and wife are to be considered next of kin to each other, see *Green v. Hudson River R. R. Co.*, 32 *Barb.*, 25; *Dickins v. N. Y. Central R. R. Co.*, 23 *N. Y.*, 158; *Merchants' Ins. Co. v. Hinman*, 13 *Abbotts' Pr.*, 110; *S. C.*, 34 *Barb.*, 410.

(*g*) It was held in *Safford v. Drew* (3 *Duer*, 627), that the complaint must aver that the deceased left a widow or next of kin, naming them, and that they suffered pecuniary injury in a specified amount from the death of de-

ceased. The later cases are inconsistent with the doctrine on which that case proceeds. *Chapman v. Rothwell*, *Ellis, Bl. & E.*, 168; *Quin v. Moore*, 15 *N. Y.*, 432; *Oldfield v. N. Y. & Harlem R. R.*, 14 *Id.*, 310; *Dickens v. N. Y. Central R. R.*, 28 *Barb.*, 41; *Keller v. N. Y. Central R. R.*, 24 *How. Pr.*, 172. But the complaint might, perhaps, be obnoxious to a motion to make more definite and certain, if the widow and next of kin were not named. *Keller v. N. Y. Central R. R. Co.*, 24 *How. Pr.*, 172.

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 Actions Given by Statute.
 

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644. *Against Owner of Warehouse, the Walls of which Fell.* (h)

I. That on and before the                      day of                      , 18     , the firm of R. Hoe & Co. was possessed of certain lots or parcels of lands, with the buildings thereon erected, situate in [*designating city, street, and number*], and which were used by said firm in the prosecution of their business as machinists; that upon a portion of said premises was situated a blacksmith's shop, also in the possession and occupation of and used by said firm in their said business, all as aforesaid.

II. That on and before said day the defendants were brewers, possessed of certain premises lying in the rear of and next adjoining the said premises of R. Hoe & Co.; and upon the defendant's said premises, and adjoining said blacksmith's shop, was a building used by defendants in their said brewing business; which building last mentioned had been negligently, carelessly, and improperly constructed, and was not sufficiently strong for the uses to which the defendants had put it; the upper part of the wall of the gable end of said building next adjoining said shop not being fastened with anchors as is commonly done, and the said wall being in other respects weak and insecure; of all of which the said defendants then and there had notice.

III. That the defendants carelessly, negligently, and wrongfully (i) placed, or caused to be placed, in the upper part of said building last aforementioned, and next adjoining that portion of the wall of the gable end thereof adjacent to the said shop

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(h) This is, in substance, the complaint in *Brown v. Harmon*, 21 *Barb.*, 508.

(i) The actual complaint in this case did not aver *directly* that the defendants acted wrongfully, negligently, or culpably; but contained an averment that the disaster was caused by the fall of a wall, "owing to the carelessness, negligence, and fault of the defendants." And it was *Held*, on appeal from judgment for plaintiff, that this was a merely inferential charge of misconduct. That is not sufficient in an action which did

not exist at common law, but is based wholly upon the statute. In such cases, in order to sustain the action, there must be a *positive allegation* not only of the acts, but of the qualifications, if any, prescribed by the statute. But the defect was held to be cured by verdict. The former rule on that subject (laid down in 1 *Saund.*, 228, a, n. 1) is not abolished by the Code. *Brown v. Harmon*, 21 *Barb.*, 508.

The necessary averment of negligence in the act of the defendants has been added in the form above.

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 For Injuries Resulting in Death. For Penalties.
 

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as aforesaid, a very large quantity of barley, much more than was customarily stowed there, and much more than the said wall was able to bear; and that in consequence thereof, and of the weak and insecure state and improper construction of said wall as aforesaid, the upper portion of the said wall of the gable end of said building was, on said            day of           , forced outward, and fell upon said blacksmith's shop, and crushed it, and cast into the said shop and its yard a large quantity of brick, mortar, rubbish, and barley.

IV. That on that day E. S. B., being then engaged in the employ of said R. Hoe & Co. as a workman, and while in their said blacksmith's shop, was, by the said fall of the wall and contents of the building, struck and instantly killed.

V. That said E. S. B., so killed, died intestate; and that on the            day of           , 18   , letters of administration on his estate, dated on that day, were duly issued and granted to the plaintiff by the surrogate of the county of           , whereby she was duly appointed administratrix as aforesaid, and that thereupon she duly qualified and entered upon the duties of her said office.

VI. That the plaintiff is the widow of the deceased, and that she was dependent upon him for subsistence, and sustained pecuniary injury by his death, to her damage            dollars.

### V. FOR PENALTIES.

#### 645. General Form. (j)

I. That on the            day of           , 18   , at           , the defendant [*here state acts constituting a violation of the statute, either following the words of the statute, or setting forth the facts more specifically.*] (k)

II. That thereby the defendant became indebted in the

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(j) This form is authorized by the provisions of 2 Rev. Stat., 482, § 10; and it is held that those provisions are not abrogated by the Code, and that the method of declaring authorized by those provisions is still proper. *People v. Bennett*, 5 *Abbotts' Pr.*, 384; overruling *Morehouse v. Crilley*, 8 *How. Pr.*, 431, which was to the contrary. (k) In declaring on a penal statute, even where the act prohibited is not an offence at the common law, it is in general enough to pursue the words of the statute; and it is not essential to con-

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 Actions Given by Statute.
 

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amount of [*the penalty or forfeiture*] (l) to the [*one for whose use the same is given*]; whereby an action accrued, according to the provisions of [*stating the title or subject-matter of the statute, and naming the section, title, and chapter, as the case may require, or in some other similar terms referring to such statute.*] (m)

646. *For Selling Liquors without a License; Alleging both Sales in Small Quantities, and Sales to Drink on the Premises.*

*First.* For a first cause of action :

I. That the defendant, being a resident of \_\_\_\_\_, did, at his house or shop known as No. \_\_\_\_\_, \_\_\_\_\_ street, therein, on [each and every day between the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_, and] the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_\_, sell strong or spirituous liquors or wines \* in quantities less than five gallons at a time, \* without having a license therefor as provided by the act to "Suppress Intemperance, and to Regulate the Sale of Intoxicating Liquors," passed April 16, 1857.

II. That thereby the defendant became, and is, indebted to the said plaintiff in the penalty and sum of \$50 for each act of selling; whereby this action accrued, according to the provisions of said act, for the aggregate amount or sum of \_\_\_\_\_ dollars.

*Second.* For a second cause of action :

*Repeat above allegations, substituting for the words between the asterisks the following:* to be drank in his said house or shop, or in an outhouse, yard, or garden appertaining thereto [*or either of them*].

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clude "against the form of the statute," if the facts averred show that the act charged is an offence against the statute. *People v. Bartow*, 6 *Cow.*, 290; and see *Lee v. Clarke*, 2 *East*, 333.

(l) In an action for a number of penalties incurred for one act,—*e. g.*, in cutting down trees, contrary to a statute giving the penalty of \$25 for each tree cut down,—the plaintiffs may declare generally in one count, without

setting forth any special matter, and recover for so many penalties, not exceeding the debt claimed as are proven. *People v. McFadden*, 13 *Wend.*, 396.

(m) In an action against an officer to recover a penalty imposed by a general statute for any neglect or refusal to perform a duty, it is enough to refer to such statute, though the particular duty in question was created by a subsequent statute. *Morris v. People*, 3 *Den.*, 381

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 For Penalties for Selling Liquor.
 

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647. *For Selling Liquors on Sunday or Election Day.* (n)

I. That the defendant, on the \_\_\_\_\_ day of \_\_\_\_\_, 18, that day being Sunday [*or*, being a day of a public election within said district], at the city of \_\_\_\_\_, and in the county of \_\_\_\_\_, within the Metropolitan Police District of the State of New York, did publicly keep [*or*, did publicly dispose of] intoxicating liquors. (o)

II. That by reason thereof the defendant is indebted to the plaintiffs in the penalty and sum of fifty dollars; and an action has accrued according to the provisions of the act of the Legislature of the State of New York, entitled, "An Act to Establish a Metropolitan Police District, and to Provide for the Government thereof," passed April 10, 1860.

648. *By Wife or Husband against Dealer in Intoxicating Liquors, for Illegally Selling to Plaintiff's Husband or Wife.*

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18, at \_\_\_\_\_, on complaint against the defendant, and satisfactory proof by this plaintiff, then and ever since the wife [*or*, the husband] of M. N., that her husband [*or*, his wife], said M. N., was an habitual drinker of intoxicating liquors, the overseers of the poor of said town [*or other magistrates*] duly gave and issued written notice to the defendant, a dealer in intoxicating liquors, forbidding the defendant to sell or give such liquor to the plaintiff's husband [*or*, wife] for the term of six months from the date of the notice, under a penalty of fifty dollars, with costs, for each and every sale or giving of such liquor.

II. That after such notice was given to the defendant, and before the expiration of the said six months, the defendant sold [*or*, gave] such liquors to the plaintiff's husband [*or*, wife], whereby he [*she*] became intoxicated.

III. That thereby the defendant became indebted to the

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(n) This form is supported by *People v. Bennett*, 5 *Albotts' Pr.*, 384. To the same effect is a decision of DALY, J., in *People v. Muller*, *N. Y. Common Pleas*, *Special Term*, December, 1857. (o) To follow the words of the act is sufficient. See *Cole v. Jessup*, 10 *N. Y. (6 Seld.)*, 96; 10 *How. Pr.*, 515.

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 Actions Given by Statute.
 

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plaintiff in the amount of fifty dollars ; and this action accrued according to the provisions of section 19 of the " Act to Suppress Intemperance, and to Regulate the Sale of Intoxicating Liquors," passed April 16, 1857.

649. *Against a Witness, for Disobeying Subpœna.*

I. That on the            day of           , 18   , at           , the plaintiff caused the defendant to be duly served with a subpœna commanding him to attend as a witness in the court, in and for the county of            [or, to attend as a witness before M. N., an officer of the            court, duly empowered to receive evidence, or, to attend as a witness before M. N., a commissioner appointed by the            court, to take testimony, or, to attend as a witness before M. N., a referee appointed by the            court, to—*briefly designating object of reference*], on the day of           , 18   , there to give testimony in behalf of the plaintiff in proceedings there pending, wherein this plaintiff was the plaintiff, and one O. P. was defendant [or otherwise *briefly designate the proceedings*].

II. That at the same time the plaintiff caused            cents, the lawful fees of the said witness, to be paid [or, tendered] to him. (p)

III. That the defendant, not regarding his duty, failed [and wilfully refused] to attend as commanded. Whereby the defendant became indebted to the plaintiff in the amount of fifty dollars, according to the provisions of section 43 [or, 45] of the Revised Statutes, vol. 2, p. 400, entitled, "Of Witnesses, their Privileges, and Compelling their Attendance."

IV. *Allege special damage, if any, thus*—The plaintiff further says, that thereby the plaintiff, when said action was called for trial, was compelled, for want of the testimony of said defendant, without whose testimony he could not safely proceed to the trial of said action, to move the said court there to postpone [or, continue] the said action ; and the said court did postpone [or, continue] the same, at the costs of the said plaintiff ; and

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(p) In an action to recover the statutory penalty from a witness who fails to appear, the declaration must aver that the fees of the witness were paid or tendered to him ; a general allegation that he was legally subpoenaed is insufficient. *McKeon v. Lane*, 1 *Hall* 319.



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Against Witness, for Disobeying Subpoena. For Violation of Ordinance.

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the plaintiff was compelled to pay on said postponement [or, continuance], as costs thereof,                      dollars, which sum he was so compelled to pay by reason of the said refusal of the said defendant; to plaintiff's damage                      dollars.

Or, IV. That the plaintiff, when said action was called for trial, was nonsuited for want of the testimony of the defendant, and his action was dismissed, with costs [or *otherwise state the substance of the judgment of nonsuit*], and the plaintiff was compelled to pay the same, and the sum of                      dollars, his costs, counsel-fees, and disbursements in the said action; and that the defendant in said action having become insolvent [or, the demand upon which said action was brought having meanwhile become barred by the Statute of Limitations], the plaintiff lost his demand, to recover which said action was brought, all which was caused by said refusal of the defendant; to the plaintiff's damage                      dollars.

V. That by reason of the premises the defendant forfeited to the plaintiff the sum of fifty dollars.

650. *For Violation of Ordinance of Board of Supervisors. (q)*

I. That on or about the                      day of                      , 18    , the Board of Supervisors of the county of Queens, in pursuance of the power in them vested by law, (r) passed a law, entitled, "An Act to provide for Shell-fish and Trout within the Waters

(q) This is, in substance, the complaint in *Smith v. Levinus*, sustained on demurrer by the Court of Appeals (8 *N. Y.* (4 *Seld.*), 472), but here made more definite and certain by stating the date of the violation. See *Brown v. Harmon*, 21 *Barb.*, 508.

In general, the by-laws of all corporate bodies, including municipal corporations, must be set forth in pleading, when they are sought to be enforced by an action, or set up as a protection. *Wilc. on Mun. Corp.*, pt. 1, § 430; *Harker v. Mayor, &c.*, of *N. Y.*, 17 *Wend.*, 199; *People v. Mayor, &c.*, of *N. Y.*, 7 *Hov. Pr.*, 81. In some of the States, however municipal ordinances may be

pleaded by citing the title and date of enactment.

(r) The authority to enact may be averred in general terms. Where a corporation are authorized to pass a by-law if they find it necessary, and they pass it, a declaration on the by-law need not aver the necessity. *Stuyvesant v. Mayor, &c.*, of *N. Y.*, 7 *Cow.*, 588.

And even if it were necessary to plead the statute upon which is founded a municipal ordinance, the defect of omitting to do so would be matter of form, and should be disregarded, if no objection be made until the trial, and the adverse party be not surprised. *Beman v. Tugnot*, 5 *Sandf.*, 153.

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 Actions for Injunctions ; and Interpleader.
 

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of Queens County," a copy of which is annexed as a part of this complaint.

II. That since the passing thereof, to wit, on the            day of           , 18   , the defendant entered the waters of Cow Bay, in said town of           , in said county, the same being the public waters in said county, and then and there took oysters from the waters in said Cow Bay by means of the process called or known as dredging, and did also throw or cast an instrument called or known as a dredge in said waters, contrary to the provisions of the third section of the said law above mentioned ; whereby an action has accrued to the plaintiff, as such supervisor, to demand and have of the said defendant            dollars, being the penalty imposed by the third section of said law.

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## SECTION XXV.

## COMPLAINTS IN ACTIONS FOR INJUNCTIONS ; AND INTERPLEADER. (a)

[The complaints in this and the remaining sections of this chapter are in actions for equitable or specific relief, such as were for the most part subjects of suits in equity under the former system of procedure.

The Code dispenses with discovery, and the peculiar formulas and three-fold repetitions of the chancery pleading, and requires only a plain and concise statement of the facts constituting the cause of action.

The theory of the Code seems to do away with the prayer for general relief, and to require the plaintiff specifically to demand the relief to which he supposes himself entitled. (b)

(a) For the allegations of a complaint for injunction against building contrary to covenants, see *Maxwell v. East River Bank*, 8 *Bosw.*, 124.

(b) *Van Santv.*, 361. It may, perhaps, be well, where there is doubt as to the facts in the case, so that the plaintiff cannot safely state the specific relief, to add the general prayer "for such other or further relief as may be just ;" and this prayer seems to have been relied on in two cases under the Code (*Truebody v. Jacobson*, 2 *Cal.*, 269 ; *Grafton v. Remsen*, 16 *How. Pr.*, 32) ; but the sounder rule is, we think, that the general prayer can in no case, under the

Code, aid the plaintiff ; and for that reason we have not usually inserted it in the following forms.

Under the chancery practice, the prayer for specific relief was not in general essential to the bill. Under a prayer for general relief, the complainant might have, as a general rule, such relief as his case entitled him to receive ; and the prayer for specific relief was inserted only for greater caution. Under that system the prayer for general relief was, of course, of the utmost importance.

The Code, however, requires (section 142) that the complaint shall con-

## Analysis of the Section.

Forms of other demands for injunctions, suited to various cases, will be found in the chapter on INJUNCTIONS, in Volume II. of this work.

651. To restrain infringement of trade-mark ; and for damages.....	p. 546
652. The same, in case of a periodical publication .....	548
653. By purchaser of physician's good-will, to enjoin his continuing the practice .....	549
654. To enjoin late partner from continuing business after dissolution....	550
655. For injunction and damages upon breach of covenant by purchaser of a secret process of manufacture, not to disclose the same.....	551
656. By the People of the State and individual property owners ;—to restrain municipal corporation from illegal act.....	558
657. To enjoin a municipal corporation from giving a deed of lands sold for non-payment of an illegal assessment for local improvements...	564
658. To restrain negotiation of bill or note .....	566
659. Against maker and indorser of note ;—to reach collateral securities held by indorser.....	566
660. Interpleader.....	567

tain "a demand of the relief to which the plaintiff considers himself entitled." This obviously requires a specific prayer for relief. And section 275 provides that the relief granted, if there be no answer, cannot exceed that demanded in the complaint. So the application to the court for judgment, in case of failure to answer, is to be "for the relief demanded in the complaint." *Code*, § 246, subd. 2.

The clear effect of these provisions seems to be, that where there is no answer to the complaint, the plaintiff is limited to the relief specifically demanded, and cannot take a larger measure under a general prayer ; and, on the other hand, where there is an answer, the court (by section 275) may grant "any relief consistent with the case made by the complaint, and embraced within the issue." Under this provision, where an answer is put in, the demand of relief becomes immaterial. The case made by the complaint, and the limits of the issue, alone determine the extent of the power of the court. *Marquat v. Marquat*, 12 *N. Y.* (2 *Kern.*), 336.

Thus it appears that whether an answer is put in or not, it can make no difference whether the prayer for gen-

eral relief is inserted or not. This construction also accords with the intention of the Codifiers. They say (*First Report*, 195, note to section 231): "It will be recollected that the plaintiff is required to state, in his complaint, the relief to which he supposes himself entitled. It will sometimes happen that he mistakes that relief ; if he do so, and the defendant do not appear, judgment ought to be given for that only which the plaintiff has demanded. If both parties appear, and the whole controversy be gone into, there seems to be no reason why the plaintiff should not have the relief to which he is entitled, though he have mistaken it in his complaint."

The case of the relief asked in a notice of motion is different ; there being no general provision that where a motion is opposed, the court shall grant any relief which the case made shall require.

This view is sustained by *Lamoureux v. Atlantic Mutual Ins. Co.*, 3 *Duer*, 680, where it was held that the relief must be distinctly asked ; and that a demand, that "if the same be necessary," the contract may be reformed, is not proper. See, also, *Mills v. Thursby*, 2 *Abbotts' Pr.*, 432.

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 Actions for Injunctions ; and Interpleader.
 

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 651. *To Restrain Infringement of Trade-mark ; (c) and for Damages.*

I. That the plaintiff is, and for a long period previous to the committing of the grievances hereinafter mentioned, had been, the manufacturer [*or, the vendor*] of an article [*describe commodity*] known as \_\_\_\_\_, which he has for \_\_\_\_\_ years last past, offered for sale and sold [*in packages, describing them, if the defendant's are similar*], labelled with his own proper device and trade-mark, adopted by the plaintiff for that purpose in the year 18 \_\_\_\_\_, of which the following is a copy [*or, specimen : copy or specimen of label ; or, in a similar manner, state other trade-mark*].

II. That by reason of the long experience and great care of the plaintiff in his said business, and the good quality of said [*commodity*], the same has become widely known in the community as a valuable and useful article, and acquired a high reputation as such, and has commanded and still commands an extensive sale at \_\_\_\_\_ [*and elsewhere*], which is and has been a source of great profit to this plaintiff.

III. That it is known as such article, to the public and to the buyers and consumers thereof, by the said name of \_\_\_\_\_, and by the plaintiff's own proper device and trade-mark afore said.

IV. That notwithstanding the long and quiet use and enjoy-

(c) In *Christy v. Murphy* (12 *How. Pr.*, 77), an injunction was granted, at the suit of the founder of "Christy's Minstrels," a public entertainment, restraining a rival establishment from the use of the same name. And the case was put upon the same principles which govern the granting of injunction to restrain infringement of trade-marks.

In an action by the proprietor of "The Irving House," the defendant was enjoined from calling his inn, in the same city, "The Irving Hotel" *Howard v. Henriques*, 3 *Sandf.*, 725. In *Knott v. Morgan* (2 *Keen*, 213), the defendant was restrained from running an omnibus having upon it

such names, devices, &c., as to form a colorable imitation of the omnibuses of the plaintiff.

So, also, an injunction will lie, at the suit of one, against another, his former copartner, restraining the continuance of the use of the signs containing the old firm-name, without sufficient alterations or additions to give distinct notice of a change in the firm. And the absolute refusal of the defendant, before suit brought, to remove such signs, exonerates the plaintiff from any obligation to offer to contribute to the expense of the removal, or to allow reasonable time therefor *Peterson v. Humphrey*, 4 *Abbotts' Pr.*, 394.

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 For Injunction against Infringement of Trade mark.
 

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ment by the plaintiff of said name and trade-mark, the defendant, well knowing the premises, but wilfully disregarding the plaintiff's rights, thereafter, and in the year 18 , wrongfully [and fraudulently] prepared and offered for sale, and now does offer for sale and sell, at , and elsewhere, an article (*d*) in imitation of the plaintiff's article, which [with intent to deceive and defraud the public and the buyers and consumers thereof], (*e*) he has caused to be put up in similar packages, and labelled with a precisely [*or*, nearly] similar label, of which false label the following is a copy [*or*, specimen: *copy or specimen of the false label*].

V. That such imitation is calculated to deceive the purchasers and consumers of plaintiff's said article, (*f*) and actually has and still does mislead many of them to buy the article sold by the defendant, in the belief that it is the article manufactured by the plaintiff, greatly to the diminution of the said business and profits of this plaintiff.

VI. That the article so put up and sold by the defendant in imitation of the plaintiff's article is of a greatly inferior quality [*state in what respects*]; and that by reason of the premises the general esteem and reputation of the said article manufactured by the plaintiff has been injured, greatly to the diminution of the said business and profits of the plaintiff. (*g*)

(*d*) The action may be maintained against the vendor of the simulated article, though he sells it as an imitation. *Coats v. Holbrook*, 2 *Sandf. Ch.*, 536.

(*e*) Fraud in the defendant is not necessary to be shown, in order to maintain the action. *Millington v. Fox*, 3 *Myl. & C.*, 338. To sustain an injunction, as distinguished from an action for damages for deceit, it is sufficient to show the fact of falsity, and that the effect will necessarily be to deceive. *Peterson v. Humphrey*, 4 *Abbotts' Pr.*, 394.

But the plaintiff himself must be free from fraud in the business which he seeks to protect. *Pidding v. How*, 8 *Sim.*, 477; *Perry v. Truefit*, 6 *Beav.*, 66; *Motley v. Downman*, 3 *Myl. & C.*,

1; *Fetridge v. Wells*, 4 *Abbotts' Pr.*, 144; *Samuel v. Berger*, 4 *Id.*, 88; *Partridge v. Menck*, 1 *How. App. Cus.*, 547; but compare *Fetridge v. Merchant*, 4 *Abbotts' Pr.*, 156.

(*f*) It is not sufficient to show that persons unable to read might be deceived by the resemblance of the labels, but it must be shown that purchasers in general, paying that attention which persons usually do in buying the article in question, would probably be deceived. *Partridge v. Menck*, 2 *Barb. Ch.*, 101; affirming *S. C.*, 2 *Sandf. Ch.*, 622; *Crashaw v. Thompson*, 4 *Mann. & G.*, 385.

(*g*) This averment is not essential to the cause of action, but may be inserted, when appropriate to the case, as material to the damages.

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Actions for Injunctions ; and Interpleader.

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[VII. That before this action, and on the                      day of                      , 18                      , the plaintiff requested the defendant to desist from his infringement of the plaintiff's trade-mark as aforesaid, and to pay to the plaintiff what, upon a just accounting, there would be due to him therefor ; yet the defendant refuses so to do.] (*h*)

VIII. That by reason of the premises the plaintiff has been injured, to his damage                      dollars.

Wherefore the plaintiff demands judgment against the defendant :

1. That the defendant and his servants and agents be forever restrained (*i*) from preparing, putting up, selling, or offering for sale said imitation of the plaintiff's article, or any article bearing the name of                      , or any imitation of said name, or bearing said false trade-mark, or any imitation of the label or trade-mark of the plaintiff.

2. That the defendant account for and pay over to the plaintiff all the profits realized by him upon sales of said [*commodity*], sold by him with any imitation of plaintiff's trade-mark.

3. For                      dollars damages.

4. And for the costs of this action.

652. *The Same, in Case of a Periodical Publication.*

That he is the proprietor and publisher of a newspaper [*or*, magazine, *or*, almanac, *or other periodical*] at                      , known and distinguished as [*name of plaintiff's publication*] ; and that as such proprietor he has published the same daily [*or*, monthly, *or otherwise*] for                      years last past, and that such publication has been made by the plaintiff, and those through whom he purchased the same, as the owners and proprietors thereof, since the original establishment of the same in the year                      , under that name. (*j*)

[*Continue substantially as in preceding form, giving copy of*

(*h*) This allegation, though usual, seems unnecessary.

(*i*) The preliminary injunction will not be granted, unless the plaintiff's legal right and the defendant's violation are clear. *Merrimack Manufacturing Co. v. Garner*, 2 *Abbotts' Pr.*, 318.

(*j*) The dissimilarity between the

names of "The National Advocate" and "The New York National Advocate," was held to be such that an injunction against the latter could not be maintained. *Snowden v. Noah*, *Hopk.*, 347. So of that between "The New Era" and "The Democratic Republican New Era." *Bell v. Locke*, 8 *Paige*, 75.

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 For Injunction against Continuing Business.
 

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*the headings or title-pages, if defendant has imitated the appearance of plaintiff's, and substituting "publication" for "commodity," and "subscribers and readers" for "consumers," &c.]*

653. *By Purchaser of Physician's Good-will, to Enjoin his Continuing the Practice. (k)*

I. That in the month of \_\_\_\_\_, 18\_\_\_\_, the defendant being a physician practising in \_\_\_\_\_, in the county of \_\_\_\_\_, and its vicinity, in consideration that the plaintiff would purchase of him [his dwelling-house, and lot, and office in that village, and the furniture thereof, and] the good-will of his practice, for the sum of \_\_\_\_\_ dollars, (l) the defendant agreed with the plaintiff that he would not practise medicine, or in any manner do business as a physician, in said county, at any time after the day of \_\_\_\_\_, 18\_\_\_\_.

II. That the plaintiff accordingly purchased from the defendant his said \_\_\_\_\_, for the price and at the terms aforesaid, and paid said sum of \_\_\_\_\_ dollars, for the good-will of said business.

III. That the plaintiff duly performed all the conditions of said agreement on his part.

IV. That the defendant, in violation of his said agreement, afterwards returned to \_\_\_\_\_, and commenced, and still continues to practise medicine, and to do business as a physician in said county.

Wherefore the plaintiff demands :

1. That the defendant be enjoined from continuing so to do.
2. For \_\_\_\_\_ dollars damages.
3. And for the costs of this action.

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(k) This form is sustained by *Holbrook v. Waters*, 9 *How. Pr.*, 335. For another complaint, seeking only damages, see *ante*, p. 377.

(l) A declaration on a contract which is in restraint of trade is bad, unless it

appears by the contract or proper averments in the declaration that there was a sufficient consideration to support such a contract. *Ross v. Sadgbeer*, 21 *Wend.*, 166.

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Actions for Injunctions ; and Interpleader.

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654. *To Enjoin Late Partner from Continuing Business after Dissolution.*

I. That on the            day of            , 18    , the plaintiff and defendant being [*or*, about to become] partners, carrying on the business of            at            , they both executed under their hands and seals articles of copartnership for the regulation of their said business ; by which, in consideration of the premises, and of the mutual agreement thereto, it was among other things provided, that in case of the dissolution of the partnership, neither of them should continue business in the building occupied by the firm, nor within one block thereof, for the space of            after such dissolution, without the consent of the other.

II. That on the            day of            , 18    , said partnership was dissolved by mutual consent.

III. That the defendant is now, and within            after said dissolution, carrying on such business at No.            ,            street in said city, being within one block of the same premises occupied by the late firm, and declares his intention to persist in so doing. That he has put placards on the door announcing his establishment in said business there, and has attempted to advertise the same facts in the public papers ; and is employing servants on the premises in the said business.

IV. That the plaintiff has not consented to these proceedings by the defendant, but has objected thereto, and requested him to desist therefrom, which he refuses to do.

V. That the plaintiff has not continued in business on the said premises, nor within one block thereof, but is endeavoring to establish himself in said business at No.            in            street ; but is unable to do so by reason of the defendant's acts aforesaid, and the injury to the plaintiff by the acts complained of cannot be fully compensated in damages

Wherefore the plaintiff demands judgment that the defendant, his agents, and servants be restrained by injunction from carrying on, or in any wise engaging in said business in the building known as No.            in            street, in the said city or within one block thereof, for the term of            from the            day of            , 18    ; and, also, from advertising or announcing in any manner his location in business there during such term, or putting or keeping up any signs or placards for



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 For Injunction Against Disclosing Secret of Trade.
 

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that purpose; and that the plaintiff have his costs of this action.

655. *For Injunction and Damages upon Breach of Covenant by Purchaser of Secret Process of Manufacture not to Disclose the Same.* (m)

I. That the plaintiff is by trade a brewer, and teacher of the art of brewing in the city of New York.

II. That by many years of labor and expending large sums of money in experiments, he became possessed of a knowledge of brewing ale by a new and improved process, which was and is an important secret of his trade, whereby the ale as so manufactured was of a better quality than that manufactured by the old and generally used process, and whereby a great saving of malt was effected; and the keeping qualities of ale so manufactured by plaintiff's process, were better than that manufactured or brewed by the old process. And that said knowledge or discovery was employed and used by this plaintiff in manufacturing, at his brewery in \_\_\_\_\_, an ale greatly liked and sought after by the public; and the said knowledge or discovery was of great value to him in his said brewing business, and of great value to any one engaged in the brewing business, to whom he should impart it; and the plaintiff made it his principal avocation for several years past to communicate his improved process of brewing to other brewers for a consideration, whereby he acquired great gains, a fact well known to the defendants.

III. That his said improved process is not, as he is advised and believes, the subject of a patent under the patent laws of the United States, it not being of such a nature as required by the law to be patentable; that therefore he never obtained a patent-right on said process, although he did obtain several patents for brewing-utensils; consequently he has no protection

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(m) This is, in substance, the complaint in *Hammer v. Barnes*, which was sustained by Mr. Justice Clerke, in the Supreme Court, at special term (1863), against a demurrer upon the objections

that it did not state facts sufficient to constitute a cause of action; that the court had no jurisdiction; that there was a defect of parties, and a misjoinder of causes of action.

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 Actions for Injunctions ; and Interpleader.
 

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against the acts of the defendants, except in the preventive remedy of this court.

IV. That, as he is advised and believes, his said process is not a matter which can be readily and specifically set forth in a written description thereof in such full, clear, and exact terms, avoiding unnecessary prolixity, as that the manner and process of making, using, and compounding the same could be readily understood by any person skilled in the art, so that such person thereby would be enabled to make, construct, compound, and use the same. <sup>(n)</sup>

V. That on or about the            day of           , 18   , the said defendants, S. S. B. and A. B. N., composing the firm of A. B. N. & Co., and who were engaged in the business of brewing in           , applied to the plaintiff to communicate said process to them, as they were desirous of adopting the same, for the sole purpose of improving the quality of the ale to be thereafter manufactured by the defendants in their brewery in           , which process the plaintiff was willing to communicate to them for a moderate sum, which would be considered nominal between the parties when compared with the value of said improvements, provided the said A. B. N. & Co. would bind themselves not to communicate the same, or any part thereof, either directly or indirectly, to any other person or persons, except the defendant C. N. B.; and provided, also, that they, said defendants, would not afford facilities, by neglect, carelessness, or otherwise, so that the said process, or any part thereof, would be discovered by any other person or persons; and provided, further, that the said defendant C. N. B. should make no other use whatever of the said process, or any part thereof, but only for the benefit of the said A. B. N. & Co., by being used in their brewery described; and provided, also, that they, the said defendants, would well and truly keep the covenants and stipulations in the agreement and bond hereinafter set forth, agreed

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<sup>(n)</sup> In *Deming v. Chapman* (11 *How. Pr.*, 382), an injunction to protect an invention was refused, on the ground not only that secrets were in their nature not capable of protection through the medium of judicial investigation, but also on the ground that the courts of the State had not jurisdiction to

grant relief to inventors, the power of securing for limited times to them the exclusive right to their respective discoveries being confided by the Constitution to the general government. The above allegations as to the nature of the plaintiff's secret were inserted to meet this view.

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For Injunction Against Breach of Agreement for Secret of Trade.

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to be preserved and kept, it being a further and tacit stipulation between the parties, that the plaintiff might be at liberty to refer to the said A. B. N. & Co., as a reference to substantiate the value of his said improvement.

VI. That thereupon, and on said day, the plaintiff and the said defendants, S. S. B. and A. B. N., composing said firm as aforesaid, entered into the agreement, of which the following is a copy: [*Copy of agreement.*]

VII. That in and by said agreement, the said S. S. B. and A. B. N. accepted all and singular the conditions aforesaid; and, as an additional security, executed and delivered to this plaintiff their bond, of which the following is a copy: [*Copy bond for performance of agreement.*] It being, however, expressly understood by and between the parties, and so stipulated therein, that they, said A. B. N. & Co., should be bound and held unto the plaintiff as well by and under the covenants in the said agreement contained as by and under the penalty and condition of the said bond.

VIII. That the plaintiff, in fulfilment and compliance with the conditions and covenants in said agreement contained to be done and fulfilled on his part, did therefore communicate to said S. S. B. his process of brewing as covenanted by him in said agreement, and gave him all necessary explanation in regard thereto; whereby the firm of A. B. N. & Co. were entitled to, and did, brew by means of said process of the plaintiff, at their said brewery in \_\_\_\_\_, ale of a far superior quality to that which they were brewing previously, by the old process, and thereby they saved large quantities of malt; to their great advantage, reputation, and profit, and they still continue to manufacture ale under said process. And the plaintiff further saith, that he in all things duly performed the conditions on his part.

IX. That the said defendants, S. S. B. and A. B. N., composing said firm as aforesaid, and the defendant C. N. B., have, in violation of the express covenants and conditions in said agreement contained, made by the said defendants A. B. N. & Co., since the execution and delivery of said agreement, communicated said process, knowledge, and secret of trade given to them as aforesaid by the plaintiff, in the brewing of ale, to divers parties and persons engaged in brewing ales, to wit

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Actions for Injunctions ; and Interpleader.

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[*naming them*], (o) and other persons ; and have afforded said several and other persons, by their neglect, carelessness, and otherwise, facilities in discovering said plaintiff's process, and certain parts thereof ; so that the said several firms above named, and others, have been enabled, under and by means of such communication and knowledge, and by reason of said carelessness, neglect, and facilities otherwise given, to manufacture, and are still manufacturing, large quantities of ale by using the said improvements of the plaintiff in their brewings, to the great advantage, profit, and reputation of said firms, and to the detriment and damage of the plaintiff ; and thereby have enabled the said several persons and firms to bring into market and sell a quantity of ale superior to that brewed by them by the old process, and similar to that of the plaintiff ; and thereby have interfered, indirectly and directly, with the ale trade of the plaintiff.

X. That the said defendants have communicated said knowledge and secret of trade in regard to the plaintiff's improved process of brewing ale to said several firms, and to other persons, and each thereof, for and in consideration of certain sums of money paid to and received by the defendants A. B. N. and S. S. B., from said firms and from other persons respectively ; and also for and in consideration of certain promises and inducements made and held out to the said A. B. N. and S. S. B. by said several named persons and others, and by each of them.

XI. That although it was definitely and distinctly understood that the said defendants should not, in any way, interfere with his, the plaintiff's, rights and business as a teacher of brewing, yet, in fraud of the rights of the plaintiff, they, the defendants, S. S. B. and A. B. N., as well as the said defendant, C. N. B., who has become possessed of said knowledge as manager of A. B. N. & Co.'s brewery under the said agreement, are ready and willing, and offer to instruct and inform any and all the brewers that they may think proper to, in and of the plaintiff's said improved process in the brewing of ale, for sums of money far less than the sum generally charged by the plaintiff for communicating his process, and thus underselling him. That

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(o) On the demurrer, these persons were held not to be necessary parties.

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For Injunction Against Disclosing Secret, and Competing with Plaintiff.

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they have held themselves out to the world as ready and willing so to do, and thereby have seriously interfered with the avocation of the plaintiff as a teacher of brewing.

XII. That prior and subsequently to the execution and delivery of said agreement, the said [*persons named in paragraph IX.*] were in negotiation with this plaintiff on the subject of the plaintiff's communicating to them his process of brewing. That said negotiations had, as plaintiff believes, progressed to such a point as that the said several parties would have acceded to this plaintiff's terms in communicating to them, and each of them, his said process; but that while negotiations were pending between this plaintiff and said several parties, the said several parties obtained, and the said defendants secretly, and without plaintiff's consent, and in fraud of his rights, communicated to them, the plaintiff's process of brewing of ale, in plain violation of the conditions of said bond and of the covenants in said agreement; and said several parties, each and all of them, thereafter declined and refused to purchase said process of the plaintiff; and this plaintiff verily believes that the said several parties and firms would have been willing to have given the sum of \$10,000, or a large sum of money, each, to the plaintiff for such his instructions in his said improved process of brewing ale, if the same had not been obtained from the said defendants, A. B. N. & Co.

XIII. That the plaintiff, in all the communications which he has made of said process to others, has done it for a valuable consideration, and also under express stipulation to preserve the secret on the part of those to whom it has been communicated, similar in terms and effect to the contract of the said A. B. N. & Co., so that the plaintiff has maintained the value of his said process, until the wrongful acts of the said defendants, by preserving it from the knowledge of the brewing trade, except where he communicated it for value received. But now, by the wrongful acts of the said defendants, the said secrets of process have been disclosed to so many who are not bound by any contract with the plaintiff to refrain from disclosing the same, that its value as a secret is very much diminished, and will be still further diminished unless the said defendants, and each of them, is restrained from further imparting said secret to others. That the amount of such injury can-

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Actions for Injunctions ; and Interpleader.

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not be estimated in money, nor can it be compensated directly, save by the preventive remedy of this court.

XIV. The plaintiff further shows, that he had also, at the time of making said agreement, and down to the time of the violation thereof by the defendants A. B. N. & Co., in addition to his occupation of teaching brewers, a large and profitable interest in a business at \_\_\_\_\_, in brewing and selling ale. That one great motive and object of the covenants and stipulations on the part of the defendants A. B. N. & Co., in the said agreement and bond contained, was that they, the said A. B. N. & Co., should not impart said improvements to other brewers, who thereby would be enabled to bring into market in aforesaid, and in the other parts of the United States, an ale superior to that brewed by them under the old process, similar in quality to that brewed by the plaintiff; and therefore it was provided in and by said agreement, that the said A. B. N. & Co. should not in any way injure or interfere with the ale trade of the plaintiff, or to offer or to sell, directly or indirectly, ale or any malt liquor to any person or persons who had been furnished by this plaintiff with said ale. That by reason of said acts and doings of the defendants in the premises, the interest in the said trade and business of the plaintiff stands in danger of being greatly injured and reduced in amount, and interfered with by the aforesaid violation of said agreement by the defendants A. B. N. & Co., in this, to wit: That the said [*persons named in paragraph IX.*], and the other persons to whom the defendants have communicated the process, have already injured and interfered with, and will interfere with the plaintiff's said business and trade, and his occupation as a teacher, in offering to sell, and in selling at lower prices and on easier terms than those of the plaintiff, ale manufactured under plaintiff's said improved process, to his customers, and those he had been in the habit of supplying with said ale, from which acts and doings the said A. B. N. & Co., under their said agreement, were especially restricted from doing, and which several acts and doings have a tendency to, and will occasion irreparable injury to this plaintiff, which cannot be estimated directly, and are not susceptible of exact proof, but which, if allowed to continue pending this litigation, will render ineffectual any judgment the plaintiff may obtain in this action.

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For Injunction Against Disclosing Secret of Trade.

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XV. And the plaintiff further shows, that the said defendants A. B. N. & Co., and each of them, have not sufficient responsibility to respond to the plaintiff, as he believes, even for the amount of damages provided to be paid in and by the terms of said bond; and he believes that he will be wholly without any pecuniary remedy for any damages sustained by the breach of said covenants, unless they are enjoined by the court.

XVI. That by the aforesaid violation of the said agreement by the defendants S. S. B. and A. B. N., the plaintiff has been directly damaged and injured in a great amount, to wit, dollars in addition to the said dollars; which last sum he claims due him from them by reason of the breach of the conditions of said bond.

XVII. That for the purposes of the relief by injunction hereinafter prayed for, the plaintiff makes the said C. N. B. a party-defendant in this action for that purpose and view only; and the plaintiff avers that the said C. N. B. well knew of the agreements, and covenants, and bond aforesaid, and its and their various stipulations at the time of the imparting to him of the process referred to in said agreement, and of the violation thereof by the said defendants; and he well knew that by the said agreements and covenants, the said A. B. N. & Co. bound themselves unto this plaintiff, and made themselves responsible to him, for the acts, omissions, and carelessness of the said C. N. B. in the premises, and that the said C. N. B., as agent and manager of the brewery of A. B. N. & Co., participated with the other said defendants in said violation.

Wherefore the plaintiff prays judgment: 1. Against the said defendants, S. S. B. and A. B. N., for the amount of liquidated damages provided to be paid in and by the said bond, to wit, the sum of dollars.

2. The further and additional sum of dollars as additional damages sustained by him by reason of the violation of said agreement by them, over and above the damages provided for in said bond.

3. That the said defendants, S. S. B., A. B. N., and C. N. B., be forever enjoined and restrained from communicating in any manner, either directly or indirectly, now or at any time hereafter, to any person or persons, any knowledge or information in relation to or concerning the plaintiff's said improved pro-

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Actions for Injunctions; and Interpleader.

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cess of brewing ale, which was imparted to said S. S. B. under said agreement of \_\_\_\_\_, 18\_\_\_\_, by the plaintiff, so that the said process of brewing, or any part thereof, shall be discovered by any person or persons whomsoever. And, also, in the mean time until said judgment, enjoining and restraining the said defendants, and each of them, from the acts aforesaid, until the further order of this court.

4. That the said defendants A. B. N. and S. S. B. in addition to paying him the liquidated damages provided to be paid to him in and by said agreement, may also be adjudged and decreed to pay to him, the plaintiff, such additional damages as he may have sustained by reason of such other breaches of the covenants in this action as may not be included in said breach calling for said \_\_\_\_\_ dollars.

5. That the said two named defendants, and each of them, may be adjudged and decreed to be the trustees of this plaintiff, for the moneys received by them from said several parties, and from others for said instructions, and to account to him, the plaintiff, therefor; and until such accounting, that he, this plaintiff, may have an order for injunction and receiver in this action.

6. And he further prays for such other and further relief in the premises against the two defendants, A. B. N. and S. S. B., as may be just, and that he may have judgment thereon, with costs of suit.

656. *By the People of the State, and Individual Property Owners,—to Restrain Municipal Corporation from Illegal Act. (p)*

The People, complaining by M. N., their attorney-general, (q) and the [individuals], complaining as well on their own behalf

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(p) This is, in substance, the original complaint in *Davis v. Mayor, &c.*, of N. Y., 2 *Duer*, 663, amended by making the attorney-general a party. As to the cause of action in the individual plaintiffs, it is further supported by *Milhau v. Sharp*, 28 *Barb.*, 228; S. C., 7 *Abbotts' Pr.*, 220; affirming S. C., 17 *Barb.*, 435.

(q) The attorney-general,—i. e., The

People of the State, by the Attorney-general—is a necessary party to a suit which seeks relief against an act of a municipal corporation which works a public injury to the whole community over which the corporate jurisdiction extends. *Davis v. Mayor, &c.*, of N. Y., 2 *Duer*, 663.

Suits for the redress or prevention of public wrongs can be brought only in



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For Injunction Against Granting Railroad Franchise.

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as on behalf of all others, owners of real property in the city of New York, who may be similarly interested in the matters herein stated, (r) allege:

I. That the plaintiffs [*individuals*] are severally owners of very considerable real estate, situated on the street in said city known as Broadway, (s) to wit: [*briefly designate the premises.*]

II. That the taxes levied and assessed by the defendants upon the real and personal property of the citizens and taxpayers of said city, for several years past, are as follows: [*tabular statement of aggregate taxes for several years*]. And the amount estimated as required for the coming year amounts to the enormous sum of            dollars.

III. That by reason of the corrupt and illegal acts of said defendants in squandering the public moneys, in farming out and disposing of, in almost every imaginable way, the public property, contracts, rights, privileges, and franchises, in the manner hereinafter stated, and in various other ways, the taxes of said city are annually increasing to an alarming degree. The effect has already been to induce large numbers of persons doing and transacting business in said city, to remove out of the limits

the name of the people; and when individuals sue, as such, they must show that their *private* rights are concerned. Wrongs sustained by stockholders in a private corporation, by the mismanagement of the corporate property by their officers, are *private* wrongs. *Wetmore v. Story*, 3 *Abbotts' Pr.*, 262. See, also, *Doolittle v. Supervisors of Broome*, 18 *N. Y.*, 155; and compare *Getty v. Hudson River R. R. Co.*, 21 *Barb.*, 617.

As to when the individuals should be joined as parties-plaintiff, see *People ex rel. Crane v. Ryder*, 12 *N. Y. (2 Kern.)*, 433; *Attorney-general v. Mayor of Dublin*, 1 *Bligh, N. R.*; *State v. Mayor, &c.*, of *N. Y.*, 3 *Duer*, 119.

It seems that the corporation of a city should always be made a party to an action, the object of which is to control the agents of the corporation in the disposal of moneys solely under the

control of the corporation. *Fitzpatrick v. Flagg*, 5 *Abbotts' Pr.*, 213.

(r) A tax-payer or corporator in a municipal corporation, who sues as such for an injunction against the corporation, must aver in his complaint that he sues in his own behalf, and also *in behalf of all others similarly interested*. *Wood v. Draper*, 4 *Abbotts' Pr.*, 322.

(s) The complaint in the case from which this is alleged alleged here that the plaintiffs were citizens of the State, residents and corporators of the city, and tax-payers therein, above the sum of \$250,—annually. But these allegations are not material, as it is only the ownership of property in the street in question, or other ground of special and individual injury, which entitles them to maintain the action. *Doolittle v. Supervisors of Broome*, 18 *N. Y.*, 155; *Roosevelt v. Draper*, 23 *Id.*, 318.

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Actions for Injunctions ; and Interpleader.

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thereof, to avoid the onerous and increasing taxes annually imposed upon the property owners of said city.

IV. [*Here followed statements of the incorporation and general powers of the defendant, and of the substance of certain provisions of the charter which the threatened acts of the defendant would violate.*]

V. That on the       day of       , 18       , a petition, of which a copy is hereto annexed as part of this complaint, and marked A, was presented to said Common Council, through their said Board of Aldermen, for an ordinance authorizing the petitioners, who signed the same, to establish and construct a railway in said Broadway.

VI. That, afterwards, numerous remonstrances were presented to said Board of Aldermen, by the principal owners of property on Broadway, against such a project.

VII. That said Broadway is the principal street or thoroughfare in said city. That the greater part of that portion of said street which lies between the Battery at the south, and Union Place at the north, a distance of about three miles, is now devoted to trading and commercial purposes; and a large portion of the trading and commercial business of the said city, greater than that of any other street, is now transacted in said street, and the small portion of the street which is yet used for dwellings is rapidly changing its character, and stores, shops, and other buildings for trading and commercial purposes are rapidly taking the place of dwelling-houses.

VIII. That said street is now constantly thronged with all kinds and descriptions of vehicles and passengers. That the portion of said street located below Canal-street, a distance of about a mile and a half from the Battery, is more thronged and crowded than any other part of said street or said city. That the average width of the carriage-way in said Broadway does not exceed forty feet [*and further statement of the actual width in various places*].

IX. That for the purpose of putting said carriage-way in the most perfect order and condition, and to facilitate the great and increasing travel thereon, which is at this time far beyond that of any other street in said city, the said corporation have very recently caused about two miles and a half thereof, extending (with the exception of a few blocks) from the Battery to Eighth-

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For Injunction Against Illegal Act of Municipal Corporation.

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street, to be paved with a very durable and expensive pavement, known as the Russ pavement, consisting of square blocks of granite, carefully laid upon a concrete bed of hydraulic cement, mixed with gravel and sharp stones.

X. That said corporation have expended upon said pavement, and paid, or are bound to pay therefor, out of the city treasury, upwards of \$500,000. By means whereof a great burden has been brought upon the tax-payers of said city, including the plaintiffs [*individuals*].

XI. That before any final action was had upon said petition, and while the same was before the Common Council for consideration, various other petitions and propositions were presented to them by men of wealth, character, and standing, residents of said city, fully and abundantly able to fulfil and perform their engagements and promises, asking for the privilege and authority to construct and establish such a railroad in said Broadway, and run cars, and carry passengers, upon the following terms: [*Statement of the various offers made, and the income that each would produce to the relief of tax-payers.*]

XII. That in and by the charter of said corporation and laws of this State, the legislative powers of said defendants are vested in the Boards of Aldermen and Assistant Aldermen thereof, and monthly sessions of said boards are authorized to be held, commencing on the first Monday of each month, and to continue for such period as in their opinion the public business may require. But neither board is authorized to adjourn for a longer period than three days, except by a resolution, to be concurred in by the other body.

XIII. That the last November session of said boards commenced on the first day of said month, on which day said Board of Aldermen met, and adjourned to the 4th then instant. On said 4th day of November said Board of Aldermen again met, and adjourned to the 8th then instant, without the concurrence of said Board of Assistant Aldermen, by resolution or otherwise; whereby, and by means whereof, as the plaintiffs claim and insist, the session of the said Board of Aldermen, and their powers as a legislative body and part of said Common Council, for and during said month of November, ceased and determined on said 4th day of November, 1852.

XIV. Notwithstanding which, said Board of Aldermen after-

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Actions for Injunctions ; and Interpleader.

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wards, and on the 19th day of November, 1852, met; and, under the color of being assembled as a Board of Aldermen, (t) and co-ordinate branch of said corporation, adopted a resolution, of which a copy is annexed as part of this complaint, and marked B.

XV. That, afterwards, said resolution was transmitted to said Board of Assistant Aldermen for their concurrence. That on the 6th day of December, 1852 (being the first day of the session for that month), the said Board of Assistant Aldermen did, notwithstanding the remonstrances and petitions aforesaid, adopt said resolution, and order the same to be transmitted to the mayor of said city for his approval.

XVI. That, subsequently, and on December 18th, 1852, said mayor returned said resolution to said Board of Aldermen without his approval, and accompanied by his objections thereto; a copy of which objections are annexed as a part of this complaint, and marked C.

XVII. That the several and respective members of the said boards who voted in favor of said resolution and grant, being a majority of the members elected to each of said boards, have given out, threatened, and declared that they intend to adopt and pass said resolution, notwithstanding the objections of said mayor; and that they intend to keep said boards in session during the month of December for that purpose, and to that end have met and adjourned (frequently for want of a quorum for the transaction of business) from time to time, in anticipation of the coming in of said mayor's objections, and with the intent of protracting their session for the purpose of passing and adopting said resolution, notwithstanding their compensation for service in their respective boards terminated after the first eight days of their session, and which have long since expired; and these plaintiffs are apprehensive that said resolution will be passed as aforesaid as soon as the said boards can by law act on the same.

XIX. That the grantees or persons named in said resolution have given out and alleged that, upon said resolution being

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(t) A complaint to restrain an injury to, or a misapplication of, the corporate property or franchises, must show fraud, corruption, or violation of law on the part of the functionaries intrusted with the corporate powers and duties *Arkenburgh v. Wood*, 23 *Barb.*, 360; and see *Leigh v. Westervelt*, 2 *Duer*, 618.

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For Injunction Against Construction of Railroad in City Street.

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adopted by said boards, they intend forthwith to accept the same in writing as therein provided; and will thereupon proceed to break up the pavement, lay down the said railway, and establish said railroad in Broadway.

XX. That the laying down of such a railway, and the establishment of a railroad in such a thronged thoroughfare as Broadway, is as yet an untried experiment; and the same cannot be laid in said street without disturbing, and thereby destroying, said Russ pavement, so recently laid therein, at such a vast expense to the tax-payers of said city.

XXI. That the laying down of such a railway would require at least four months, if prosecuted with diligence; during all which period said street would be rendered almost wholly impassable, to the great injury and detriment of the plaintiffs [*individuals*] in the enjoyment of their said property, (*u*) and to other persons having occasion to use and travel in said street.

XXII. That the said [*individual plaintiffs*], and all other citizens and travellers, now have a right to the free and common use of the whole of the carriage-way of said street, with their carts, carriages, and other vehicles; and that establishing a railroad in said street will be appropriating the street to a new and unauthorized use, and one which is exclusive in its nature, to the great injury and damage of those who now have a free and common right therein as aforesaid.

XXIII. That said street is too narrow to admit the establishing of such railway, consistent with the rights, privileges, and interests of the citizens and tax-payers of said city, and other travellers in said street. And such railway, if constructed, will be a public nuisance in said street.

XXIV. That said corporation has no right, power, or authority, under any law of this State, or otherwise, to establish or construct such a railroad in said street; nor can they grant

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(*u*) Where plaintiff seeks an injunction to restrain the appropriation of a public street, on the ground of a special injury to him by preventing access to his adjoining lot, he should specify this grievance in his complaint; a general charge that the work will be specially injurious to him, is not sufficient. But

if no motion is made to require plaintiff to reform his complaint in that respect, and no objection is made upon the trial to the introduction of evidence tending to show such injury, the objection will be considered as waived. *Wetmore v. Story*, 22 *Barb.*, 414; S. C., 3 *Abbotts' Pr.*, 262.

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Actions for Injunctions ; and Interpleader.

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the right or privilege to construct and establish such a railroad therein to any person or persons. (v)

XXV. That all the said acts and doings of said Common Council, in relation or tending to the establishment of said railroad, are in bad faith, and in direct opposition to the interests of said corporation, and of the citizens, tax-payers, and other inhabitants of said city, and of travellers therein.

Wherefore the plaintiffs demand judgment, as well on their own behalf as on behalf of all others, tax-payers and corporators of said city, that the defendants, the counsellors, attorneys, solicitors, and agents, and each and every of them, be forever restrained from granting, in any way or manner, to J. S. and others, the persons named in said resolution, or their associates, or any other person or persons whomsoever, the right, liberty, or privilege of laying a double or any track for a railway in Broadway from the South Ferry to 57th street, or any railway whatsoever in Broadway ; or of breaking or removing the pavement, or of obstructing Broadway in any other manner preparatory to or for the purpose of laying or establishing any railway therein ; and for such other and further relief as to the court shall seem just, together with the costs of this action.

657. *To Enjoin a Municipal Corporation from Giving a Deed of Lands Sold for Non-payment of an Illegal Assessment for Local Improvements.* (w)

I. That the plaintiff is the owner in fee-simple of [*designate his estate,—e. g., thus :*] one undivided seventh part of four lots of land on 25th and 26th streets, in the sixteenth ward of the city of New York, bounded and described as follows—[*description*] ; the other six-sevenths being owned in fee-simple by the defendants [*designating which*].

II. That the defendants W. and X. are the owners in fee of

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(v) Following this averment, the complaint in this case contained various statements of what the plaintiffs claimed to be the duty of the defendants, and of the reasons why they should be restrained, which is unnecessary in a complaint under the Code.

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(w) This form is supported by *Baldwin v. City of Buffalo*, 29 *Barb.*, 396 ; *Matthews v. Mayor, &c.*, of N. Y., 14 *Abbotts' Pr.*, 209 ; and is given in the *Report of the Commissioners of the Code*, p. 105.

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To Enjoin Execution of Sale for Assessment.

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two lots adjoining the four above described lots ; which said two lots are bounded, taken together, as follows : [*description* ]

III. That the two lots last above described, and the two of the other four lots which front on 26th-street, were sold in one parcel on the       day of       , 18    , by the defendants, the mayor, aldermen, and commonalty of the city of New York, to satisfy two alleged assessments for local improvements,—one for the opening of 26th-street from the Hudson river to the Bloomingdale road, and the other for setting curb and gutter in the 8th avenue from 24th-street to 42d-street.

IV. That the other two of the first described lots, fronting on 25th-street, were sold in one parcel on the said       day of       , 18    , by the said mayor, aldermen, and commonalty, to satisfy two alleged assessments for local improvements,—one for opening 25th-street, and the other for setting the curb and gutter aforesaid.

V. That in the proceedings relative to all the said assessments, and in the proceedings to collect the same, both fraud and legal irregularity have been committed.

VI. That the following, among others, are the frauds and legal irregularities committed, in respect to the assessment for opening 26th-street :

1. That the land in the street, to the middle thereof, fronting on the said lots, belonged to the same owner as the said four lots, which owner was wrongly stated to be one M. N.

2. That the benefit above the damage was assessed at       dollars, for the said four lots with two adjoining lots, thus charging the owner with a large sum for taking his own property.

3. That the petition of the said mayor, aldermen, and commonalty, and the order of the Supreme Court thereon made, appointing commissioners of estimate and assessment, appointed them for the opening of 26th-street from Hudson river to the Fourth avenue, instead of to the Bloomingdale road.

VII. That the following, among others, are the frauds and legal irregularities committed in respect to the proceedings to collect all the said assessments :

1. That notices were not left before the advertisement of sale at the residence of the owners or with the tenants on the property, which property was then occupied.

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Actions for Injunctions ; and Interpleader.

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2. That the advertisement described the assessment for opening 26th-street as confirmed on the            day of            , 18    ; whereas, if it was ever confirmed, it was confirmed on the day of            , 18    .

VIII. The plaintiff further alleges, that upon the said sales the property was bid in by the said mayor, aldermen, and commonalty, who shortly afterwards assigned the said bid for the lots on 26th-street to the defendant W., and for the lots on 25th-street to the defendant X.; but that no lease has yet been executed, pursuant to the said sale.

Wherefore, the plaintiff demands judgment :

1. That the said mayor, aldermen, and commonalty be enjoined from executing or delivering any lease pursuant to the sales above mentioned.

2. That the said assessments, and all proceedings to collect the same, be declared void, and set aside.

3. For the costs of this action.

658. *To Restrain Negotiation of Bill or Note.*

[*Allege making of note for specified object, and its failure,—e. g., as in Form 553, ante, 459.*]

II. That the defendant still retains said note in his possession ; and though, on the            day of            , 18    , the plaintiff requested him to deliver it up, he refused so to do.

Wherefore, the plaintiff demands :

1. That the defendant be enjoined from negotiating, transferring, or enforcing the same.

2. That it be delivered up and cancelled.

3. And for the costs of this action.

659. *Complaint on a Note, against Maker and Indorser, ana Seeking to Reach Collateral Securities held by Indorser. (x)*

I. That on the            day of            , 18    , at            , the defendant [*maker*], for the purpose of inducing the plaintiff to sell him certain goods, agreed to give him, in payment therefor, the said defendant's promissory note, indorsed by the defendant [*indorser*]; and represented to the plaintiff that the said

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(x) This form is from the *Report of the Commissioners of the Code*, p. 123



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To Reach Collateral Securities. Action for Interpleader.

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[*indorser*] would be adequately indemnified, by collateral security, for his indorsement.

II. That the plaintiff was thereby induced to sell and deliver to the said [*maker*] certain goods, of the value of        dollars.

III. That on the        day of       , 18   , at       , in consideration thereof, the said [*maker*], by his promissory note, promised to pay to the order of the said [*indorser*]        dollars,        months [*or, days*] after said date.

IV. That the said [*indorser*] indorsed the same to the plaintiff.

V. That on the        day of       , 18   , the same was presented to the said [*maker*] for payment, but was not paid.

VI. That due notice thereof was given to said [*indorser*].

VII. That the same has not yet been paid.

VIII. That the said [*maker*], when he procured the said indorsement from the said [*indorser*], lodged with him six promissory notes, for the aggregate sum of        dollars, made by one M. N., and indorsed by the said defendant [*maker*] as security for such indorsement.

IX. That the said defendant [*maker*] is endeavoring to withdraw the said notes from the said [*indorser*], in order to prevent their application in payment of the demand of plaintiff on the said indorsement.

X. That the plaintiff has requested the said [*indorser*] to apply the said notes to the payment of the plaintiff's said claim, but he refuses to do so.

Wherefore, the plaintiff demands judgment:

1. For        dollars, with interest from the        day of       , 18   .

2. That the notes placed in the hands of the said [*indorser*], as security, be applied to the payment of the said sum.

3. That the defendants be restrained by injunction from disposing of the said notes to any person other than the plaintiff.

### 660. *Interpleader.*(y)

I. That before the making of the claims hereafter mentioned

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(y) This is the form given in the interpleader is allowable under the *Report of the Commissioners of the Code*. *Pepoon v. White*, 2 *Code R.*, *Code*. (Form No. 156.) An action for 109; *Beck v. Stephani*, 9 *How. Pr.*, 193.

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 Creditors' Suits.
 

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one M. N. deposited with the plaintiff [*describe the property*] for [safe keeping].

II. That the defendant W. X. claims the same [under an alleged assignment thereof to him from the said M. N.]

III. That the defendant Y. Z. also claims the same [under an order of the said M. N., transferring the same to him].

IV. That the plaintiff is ignorant of the respective rights of the defendants.

V. That he has no claim upon the said property, and is ready and willing to deliver it to such persons as the court shall direct.

VI. That this action is not brought by collusion with either of the defendants.

Wherefore, the plaintiff demands judgment:

1. That the defendants be restrained, by injunction, from taking any proceedings against the plaintiff in relation thereto.

2. That they be required to interplead together concerning their claims to the said property.

[3. That some person be authorized to receive the said property pending such litigation.]

4. That upon delivering the same to such [person] the plaintiff be discharged from all liability to either of the defendants in relation thereto.

5. And that the plaintiff's costs be paid out of the same.

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 SECTION XXVI.

## COMPLAINTS IN CREDITORS' SUITS.

[A creditor, having recovered judgment, may bring an action against his debtor to set aside any fraudulent obstructions which exist in the way of the satisfaction of his execution; so, also, after his execution has been returned unsatisfied, he may bring an action to reach things in action, and other equitable assets of the debtor, such as cannot be reached by execution.

In the former case, the action is in aid of the execution, (a) and the plaintiff must allege that he has issued execution. (b)

In the second class of cases, the action proceeds upon the ground that an

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(a) The right to this relief was established by *Hendricks v. Robinson*, 2 *Johns. Ch.*, 283. *McCullough v. Colby* (5 *Bosw.*, 477; 4 *Id.*, 603), even where the property is real estate.

(b) This must be done, according to

## Analysis of the Section.

execution proves unavailable, and that the plaintiff is entitled, therefore, to lay hold upon property not leviable. (c) The Code does not take away these remedies; (d) but it does not authorize the injunction and receiver to be sought in the same action in which the judgment is recovered, except by the more summary proceeding which it provides supplementary to execution. A creditor at large cannot maintain an action of this nature. (e)

The usual form of prayer for relief in bills in chancery was very broad, seeking to enjoin the debtor from interfering with any of his property, and to require him to assign it all to the receiver. But, under the Code, the creditor cannot have a discovery by action: if he would examine the defendant generally, and gain a lien on assets which he cannot allege the existence of in the complaint, his remedy now is to take proceedings by order supplementary to execution.]

661. Commencement by plaintiff suing also for others .....	569
662. Upon a justice's judgment .....	570
663. Against debtor, to reach demands due him from third persons .....	571
664. To set aside an assignment which is void on its face .....	574
665. Against the judgment-debtor, his assignee, and a pretended creditor named in the assignment;—to set aside a general assignment, for fraud extrinsic to the instrument .....	575
666. Against debtors who transferred their assets to a third person for his note, and assigned the note for benefit of creditors,—seeking to set aside the transaction as fraudulent, and for a receiver .....	577
667. Against debtor and his trustee, to reach the trust-fund or its income ..	579
668. By an assignee of a judgment, against the judgment-debtor and his mortgagee of personal property, and an assignee to whom, by a fraudulent agreement between them, the debtor's property, including the mortgaged property, had been transferred .....	580
669. Against judgment-debtor, and one to whom he fraudulently confessed judgment;—to set aside judgment, and a sale thereunder .....	582

661. *Commencement, where the Plaintiff Sues on Behalf of Other Creditors. (f)*

The plaintiff, complaining on behalf of himself and all other

(c) This remedy was established here by the case of *Hadden v. Spader*, 20 *Johns.*, 554; 5 *Johns. Ch.*, 280. It is confirmed and regulated as to personal property by the Revised Statutes (2 *Rev. Stat.*, 173, §§ 38, 39); and the courts proceed upon the same principle, by analogy, in respect to real property which cannot be reached by execution. *Congden v. Lee*, 3 *Edw.*, 304.

(d) *Hammond v. Hudson River Iron & Machine Co.*, 20 *Barb.*, 378; *Catlin v. Doughty*, 12 *How. Pr.*, 457.

(e) *Reubens v. Joel*, 13 *N. Y.* (3

*Kern.*), 488; *Bishop v. Halsey*, 3 *Abbotts' Pr.*, 400; *Cropsey v. McKinney*, 30 *Barb.*, 47.

(f) A judgment-creditor may file a bill of this nature either in his own name and for his own benefit, or he may join with other creditors standing in the same situation with himself, or he may file a bill in behalf of himself and all others being judgment-creditors, whose executions have been returned unsatisfied, and who may choose to come in and contribute to the expenses of the suit. 2 *Barb. Ch. Pr.*,

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 Creditors' Suits.
 

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judgment-creditors of the defendant [whose executions have been returned unsatisfied, (g) and] who shall in due time come in and seek relief by, and contribute to the expenses of this action, alleges :

662. *Upon a Justice's Judgment.*

I. That on the            day of           , 18   , at           , before M. N., a justice of the peace in and for the town of           , the plaintiff recovered a judgment, which was duly given by said justice, against the defendant for            dollars damages and            dollars costs, in an action wherein this plaintiff was plaintiff [*or*, defendant], and the defendant herein was defendant [*or*, plaintiff].

II. That on the            day of           , 18   , a transcript of the same was filed and docketed in the office of the clerk of the county of (h)            [*if the judgment-debtor resided in another county, add: and on            a transcript of the same was filed and docketed in the office of the clerk of the county of*], in which county the defendant then resided [*or state ignorance of residence, &c., as in next form*].

III. That on the            day of           , 18   , an execution in due form was issued upon the said judgment against the personal and real property of the defendant, to the sheriff of said [*last mentioned*] county, in which county the defendant then resided [*or allege non-residence: see next form*].

[*Continue as in other forms.*]

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154; *Edmeston v. Lyde*, 1 *Paige*, 637; *v. Egan*, 7 *Paige*, 610; *Cooke v. Smith*, *Wakeman v. Grover*, 4 *Id.*, 23; *Lentilhon v. Moffatt*, 1 *Edw.*, 451. 3 *Sandf. Ch.*, 333.

It has been held, that if the frame and prayer of a bill be essentially that of a creditor's bill, the omission of this usual introductory statement is immaterial, it being matter of form merely. *O'Kelly v. Bodkin*, 2 *Ir. Eq. R.*, 361.

(g) It is only those who might have filed the bill who can come in. *Parmelee*

(h) The docketing of justices' judgments must be averred, unless, perhaps, where it is averred that the defendant, neither at the time of issuing the execution, nor at the time of filing the bill, had any real estate or chattels real which could have been reached upon execution. *Crippen v. Hudson*, 13 *N. Y. (3 Kern.)*, 161.

## Against Debtor, alone.

663. *Against Debtor to Reach Demands Due him from Third Persons.*

I. That at term [or, on the day of , 18 , (i) at , in the Court in and for the county of ], the plaintiff recovered a judgment, which was duly given (j) by said court against the defendant [and M. N. and O. P.], for dollars, in an action wherein this plaintiff was plaintiff [or, defendant], and the defendant herein was [or, the defendant herein, and said M. N. and O. P. were] defendant [or, plaintiff]; and that on the same day [or, the day of , 18 ,] said judgment was docketed in the office of the clerk of said county [and on the day of , 18 , a transcript thereof was filed, and the judgment docketed in the county of M.] (k)

II. That on the day of , 18 , an execution in due form was issued upon the said judgment against the personal and real property of [all said debtors] to the sheriff of said [last-mentioned] county, in which county the defendant then resided [or, in which county was the defendant's last known residence within this State, his residence \* at the time of said execution being unknown to the plaintiff, and not ascertainable, though the plaintiff made diligent inquiry therefor] (l) [or

(i) The date should be that at which the judgment was perfected by signing and filing the record, for until then no proceedings can be taken. 2 Rev. Stat., 360, § 11. Or it may be alleged as recovered on the day on which the adjudication was had, inserting here, "and thereafter, and on the day of , 18 , the record of said judgment was duly signed and filed." Baggett v. Eagleson, Hoffm., 377.

(j) The words "which was duly given" are not necessary in the case of a judgment of another court of co-ordinate jurisdiction. Williams v. Hogeboom, 8 Paige, 469.

(k) If the plaintiff has several judgments, state them separately in the same way.

A second judgment recovered for the same cause does not preclude a creditor's bill on the first judgment. Bates

v. Lyons, 7 Paige, 85. But where, after a creditor's bill was filed, the debtor and a third person gave their note for the debt, upon which a judgment was obtained against both; it was held not a proper case for the filing of an original bill, upon the last judgment, and at the same time continuing the first suit; but complainant should either dismiss the first bill, or file a supplemental bill. Winslow v. Pitkin, 1 Barb. Ch., 402.

If the judgment is one which an execution will run into any county of the State, it is not necessary to aver the docketing of it in the county of defendant's residence, unless the bill shows real property of the defendant situate there. Millard v. Shaw, 4 How. Pr., 137.

(l) Reed v. Wheaton, 7 Paige, 663 Hope v. Brinckerhoff, 3 Edw., 445.

## Creditors' Suits.

say, in which county was the defendant's residence at the time of bringing said action, his residence, *continuing as above from the \**].

III. That the said execution has been duly returned by said sheriff wholly unsatisfied (*m*) [*or*, unsatisfied, except as to the sum of                    dollars], and there is now due to the plaintiff on said judgment                    dollars, and interest from the                    day of                   , 18                   . (*n*)

IV. That a short time before the commencement of the action in which the said judgment was obtained, and after the indebtedness upon which said judgment was obtained had accrued, the said defendant was, and for several years previous thereto had been, engaged in mercantile business at                   , and, as the plaintiff is informed and believes, various persons became indebted to him to a large amount; that, although the said defendant about the time of, or soon after, the commencement of this action, to wit, about the                    day of                   , 18                   , did assign and transfer all his stock in trade to one M. N., yet the said business is still wholly unsettled; and that the defendant had, at the time of the commencement of this action, debts due him to a large amount, (*o*) to wit, to an amount not less, as plaintiff is informed and believes, than                    dollars, a considerable portion of which are evidenced by charges on his books of account, which the said defendant refuses to produce, or allow to be examined by or on behalf of the plaintiff; and the plaintiff is therefore unable to specify, and cannot learn, and does not know, the particular items or amounts of said indebtedness, or the names of the several persons from whom the same are due; but is informed and believes that several of them, owing defendant in the aggregate a sum not less than

(*m*) This allegation is essential, both by the previous practice and by the statute. It is not enough to aver facts going to show that an execution would be mere matter of form, and useless. *McElwain v. Willis*, 9 *Wend.*, 548; 3 *Paige*, 505. And this rule is unchanged by the Code. *Crippen v. Hudson*, 13 *N. Y.* (3 *Kern.*), 161. But it is not now necessary to show that the sixty days

elapsed before return. *Forbes v. Waller*, 25 *N. Y.*, 430.

(*n*) It is usual and proper to state the amount still due; but the old rule and statute, requiring the value in controversy to be shown to exceed a certain amount, are not now in force.

(*o*) It should be shown that the debts due to the defendant are of some value. *Waldo v. Doane*, 2 *Ch. Sent.*, 7.

## Against one of Several Debtors.

dollars, reside at \_\_\_\_\_, and are solvent and able to pay the respective demands against them. (*p*)

*Where a debtor in the judgment is not made defendant in this action because of insolvency or absence, add:*

V. That said [insolvent or absentee] is wholly insolvent and destitute of property [or, is not and has not been for the space of \_\_\_\_\_, within this State, but resides at \_\_\_\_\_, in the State of \_\_\_\_\_, and has no property within this State. (*q*)

*Where a debtor in the judgment is not made a defendant because he was merely a surety, add:*

VI. That the said judgment was recovered in an action [describing it,—*e. g.*, thus],—brought to foreclose a mortgage made by the defendant to said [surety], with a bond collateral thereto, and that said bond and mortgage was assigned to the plaintiff by the said [surety], who thereupon guaranteed the payment thereof; but the same not being paid, and the mortgaged premises being sold upon foreclosure in said action for less than the sum due, said judgment was recovered for the deficiency, as to which the said [surety] was merely a surety, and not liable as a principal debtor, and which it was, by a provision in said judgment, directed should be levied of the property of the defendant [principal debtor], if it could be so collected; and if it could not, then to be levied of the property of said [surety]. (*r*)

Wherefore, the plaintiff demands:

1. That the said defendant be adjudged to apply to the payment of the amount of said judgment and interest thereon, together with the costs of this action, said property, debts, choses in action, and equitable interests belonging to him, or held in

(*p*) A judgment-creditor can only entitle himself to the relief which the statute provides, by averring in his bill, and establishing by proofs, that at the time of the filing of the bill, "personal property, money, or things in action," belonging to the debtor, or held in trust for him, were in the possession or under the control of the defendant, against whom a decree is sought. *Nicholson v. Leavitt*, 4 *Sandf.*, 252, 271.

(*q*) This is a necessary and sufficient

excuse for the non-joinder. *Van Cleef v. Sickles*, 5 *Paige*, 505.

(*r*) See *Speiglemeyer v. Crawford*, 6 *Paige*, 254. A general averment that the defendant was primarily liable for the obligation upon which the judgment was recovered, is not enough. *Strange v. Longley*, 3 *Barb. Ch.*, 650. But was held enough, after stating facts to show the relation of suretyship, to aver that the creditor's suit was prosecuted for the benefit of the surety. *Child v. Brace*, 4 *Paige*, 309.

## Creditors' Suits.

trust for him, or in which he is in any way or manner beneficially interested.

2. That he be enjoined from selling, transferring, or interfering with said property, debts, things in action, and equitable interests.

3. That he be prohibited from making an assignment, or confessing any judgment, to enable other creditors or persons to obtain a preference over plaintiff, or to take any portion of defendant's property.

4. That a receiver may be appointed of all said property, equitable interests, things in action, and effects of the said defendant, and said defendant directed to execute to him an assignment thereof, and said receiver sell, or otherwise dispose of the same, and convert the same into money, as soon as may be, and that said receiver apply so much of the proceeds thereof as may be necessary for that purpose, to the payment of the plaintiff's said debt, with interest and costs of this action.

664. *To Set Aside an Assignment which is Void on its Face.*

I., II., and III. *Allege judgment and issue, and return of execution, as in preceding forms.*

IV. *Allege making of assignment, setting it forth or annexing it, as in the following form, I, to IV., and adding:* And the plaintiff alleges and submits that the said instrument of assignment is fraudulent and void upon its face; and he alleges that it was made and executed by the said defendant [*assignor*] [and accepted by the defendants, *assignees*], with the intent to hinder, delay, and defraud the creditors of said [*assignor*]. (s)

[*Continue as in other forms.*]

(s) The latter of these allegations is necessary, according to *Hogan v. Burnett*, 37 *Miss.* (8 *George*), 617; where it was held that a bill to set aside a fraudulent conveyance, must not only allege that it was "void on its face and fraudulent as to creditors;" but, also, that it was made with the intent to hinder, delay, or defraud creditors.

The latter allegation is probably sufficient without the former. *Jessup v. Hulse*, 29 *Barb.*, 539. They are both sufficiently definite and certain. It is not necessary to specify the objectionable clauses. *Hastings v. Thurston*, 10 *Abbotts' Pr.*, 418; *Jessup v. Hulse*, 29 *Barb.*, 539.



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To Set Aside Assignment Not Void on its Face.

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665. *Against the Judgment Debtor, his Assignee, and a Pretended Creditor named in the Assignment;—to Set Aside a General Assignment, for Fraud Extrinsic to the Instrument.*

I., II., and III. *Allege judgment and issue, and return (t) of execution, as in Form 661, or 662.*

IV. That after the contracting of the debt on which the aforesaid judgment was recovered, the said [*judgment-debtor*] assigned all his property to the defendant [*assignee*], in trust for the payment of his debts [*or, made an assignment, of which a copy is annexed as a part of this complaint.*](*u*)

V. That the said [*assignee*] accepted the said trust, and has collected a large sum of money and other property from the assets of his assignors, amounting in all to the value of over dollars. (*v*)

VI. That the property so assigned is of the value of dollars.

VII. That the said assignment was made by the said [*judgment-debtor*] with the intent to delay, hinder, and defraud his creditors; (*w*) that it was not accompanied by an immediate and continued change of possession of the property; that ever

(*t*) If the plaintiff merely desires to remove the obstruction to his levying on tangible property, he need not aver a return of the execution.

(*u*) Where there is any objection to the legality of the provisions of the assignment, it should be set forth or annexed.

(*v*) The action can be maintained without this averment of an acceptance of the trust; for where the assignees do not claim as such, the plaintiff still has a right to call upon them by action to disclaim all title under it, or take the burden of accepting the trusts conferred by it, or of claiming to do so. *Gaspar v. Bennett*, 12 *How. Pr.*, 307.

A complaint against an assignee in a fraudulent transfer of property made by a deceased person, joining with the assignee the administrator of his as-

signor as defendant, and seeking to have the transfer set aside, should allege that the administrator claimed to regard the transfer as *bona fide*. *Bate v. Graham*, 11 *N. Y. (1 Kern.)*, 237.

(*w*) In an action to set aside an assignment for the benefit of creditors, a mere general allegation that it was made for the purpose of delaying, hindering, and defrauding creditors, is not sufficiently specific where the fraud is extrinsic to the instrument. *Kinder v. Macy*, 7 *Cal.*, 206; *Meeker v. Harris*, 19 *Id.*, 278; and see *Harris v. Taylor*, 15 *Id.*, 348; but such an allegation has been held sufficient on demurrer. *Mott v. Dunn*, 10 *How. Pr.*, 225.

In a suit to set aside a conveyance as fraudulent, an allegation that the grantee is a fictitious person, is not inconsistent. *Purkitt v. Polack*, 17 *Cal.* 327.

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Creditors' Suits.

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since the same was executed and delivered, and up to the present time, the said property has remained in the actual possession and under the control of said [*judgment-debtor*], who has retained possession and control thereof under the false and fraudulent pretence that he is agent of said [*assignee*].

VIII. That the pretended indebtedness set forth in said assignment as due from the defendant [*judgment debtor*] to the defendant [*the preferred creditor*] is fictitious; that, in fact, no such indebtedness exists, but that the same is therein inserted for the purpose of enabling the defendant [*judgment-debtor*] to distribute the proceeds of the goods passed under the assignment among his friends, and thereby to keep the possession and control thereof himself.

IX. That the defendant [*judgment-debtor*] has not any property other than that embraced in the assignment aforesaid, out of which the execution aforesaid could be satisfied in whole or in part; and that unless the said property can be reached and applied to the payment of said judgment, the same must remain wholly unpaid.

Wherefore the plaintiff demands judgment:

1. That said assignment be adjudged fraudulent and void as against the plaintiff [and such other judgment-creditors of said *judgment-debtor* as shall elect to come in and share the expenses of this action].

2. That a receiver of all the property and effects of said [*judgment-debtor*] be appointed.

3. That the defendants be adjudged to account for all the property received by them or either of them under said assignment, and for all proceeds arising from sale thereof, and deliver the same to such receiver.

4. That the defendants be, in the mean time, enjoined from disposing of any of said property, or paying away any of the proceeds thereof, or in any wise interfering therewith.

5. That said receiver pay, out of the proceeds of said property, the judgment aforesaid, and the costs and expenses of this action, and hold the balance subject to the further order of this court.

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To Set Aside Assignments.

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666. *Against Debtors who Transferred Their Assets to a Third Person for his Note, and Assigned the Note for Benefit of Creditors,—Seeking to Set Aside the Transaction as Fraudulent, and for a Receiver.*

I., II., and III. *Allege judgment and issue, and return of execution, as in Form 661 or 662*

IV. That on the            day of           , 18   , said [*judgment-debtors*] were booksellers at           , doing business as partners under the firm-name of Y. Z. & Co.; and were possessed of [*designating assets,—e. g., thus*],—a large stock of books, stationery, fancy articles, jewelry, and musical publications, a valuable lease of their store, No           ,            street, having five years to run, and sundry demands against other persons; but were insolvent and unable to pay their creditors punctually or in full.

V. That on that day, and after the indebtedness for which the plaintiff's judgment was recovered had accrued, the said defendants [*judgment-debtors*] in contemplation of, and with full knowledge of their insolvency, made a pretended sale of their said stock to the defendant [*transferee*], then a clerk in their employ in their said store, and took in payment therefor his promissory notes having several months to run, but for what exact amounts these plaintiffs do not know and cannot state.

VI. That the defendant [*clerk*] was wholly irresponsible and insolvent, and has no means of paying his said notes, except such moneys as he may derive from the sale of the property transferred to him as aforesaid.

VII. That thereafter and on the same day the said [*judgment-debtors*] executed and delivered to the defendant [*assignee*] an instrument in writing, of which the following is a copy: [*copy assignment; or, say, of which a copy is annexed as a part of this complaint, and annex a copy at the end of the complaint*].

VIII. That the property so assigned is of the value of about            dollars and upwards.

IX. That the said note to the said [*clerk*], and the said assignment to [*assignee*], were intended by each and all of the aforesaid defendants to be one transaction, and were in fact one transaction, and were intended and completed for the purpose

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Creditors' Suits.

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of delaying, hindering, and defrauding the creditors of said [*judgment-debtors*], by putting it out of the power of such creditors to reach by execution, or other due process of law, the stock and assets of the said [*judgment-debtors*]; that such sale and assignment were not, nor was either of them, followed by immediate and continued change of possession; that ever since the said sale was made, and since said assignment was delivered, and up to the present time, the said property has remained in the actual possession and under the control of the said [*judgment-debtors*], who have retained possession and control thereof under the false and fraudulent pretence that they are agents of said [*clerk*].

[X. That said assignment is fraudulent and void upon its face.]

XI. That the defendants [*judgment-debtors*] have not, nor has either of them, any property other than that embraced in the sale and assignment aforesaid, out of which the execution aforesaid could be satisfied in whole or in part, and that unless the said property can be reached and applied to the payment of said judgment, the same must remain wholly unpaid.

Wherefore these plaintiffs demand judgment :

1. That the said sale by the defendants [*judgment-debtors*] to the said [*clerk*], and said assignment by the defendants [*judgment-debtors*] to the defendant [*assignee*], may each be declared fraudulent and void as against these plaintiffs.

2. That a receiver of all the property and effects of the said [*judgment-debtors*], or either of them, which they or either of them had at the time of the said sale to the defendant [*clerk*], or at any time thereafter, be appointed.

3. That the defendants, and each of them, be adjudged to account for all the property received by them, or either of them, under either the sale or assignment aforesaid, and for all proceeds arising from the sale thereof, and deliver the same to such receiver.

4. That the defendants, and each of them, be in the mean time enjoined from disposing of any of said property, or paying away any of the proceeds thereof, or in any wise interfering therewith.

5. That the said receiver be directed to sell the said property, or so much thereof as may be necessary, and to pay out

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To Reach Trust-fund or Annuity.

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of the proceeds of said property the judgment aforesaid, and the costs and expenses of this action, and hold the balance subject to the order of this court.

667. *Against Debtor and his Trustee, to Reach the Trust-fund or its Income.* (x)

[*Allege judgment, and execution unsatisfied, as in Form 662, or 663.*]

IV. That the defendant [*judgment-debtor*] is the beneficiary under a trust created by deed heretofore executed by him [*or, created by the will of one M. N., deceased*], of which a copy is hereto annexed as a part of this complaint.

V. That the fund, consisting of about the sum of            dollars, is now in the hands of the defendant [*trustee*] as trustee [*or, executor*], and the defendant [*judgment-debtor*] is entitled to receive, or does receive annually, the sum of            dollars therefrom.

VI. [*If it is a trust under which the creditor can only reach surplus income, state facts to show what it is,—e. g.,*] that the defendant [*judgment-debtor*] is a man without family, and residing at           , where he has been for the last three years, and still is, boarding, and the sum of            dollars annually is a reasonable sum for his support, and that the sum of            dollars annually is surplus income; *and if the creditor is only entitled to surplus accrued, add—*of which surplus            dollars is in the hands of the defendant [*trustee*], already accrued, but not paid over.

Wherefore the plaintiff asks that the defendants be enjoined respectively from paying over and from receiving said fund [*or, so much of said income [already accrued] as is not necessary for the support of the defendant, judgment-debtor, and his family*], and that the same be applied to the satisfaction of the plaintiff's judgment and interest, and the costs of this action.

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(x) See *Scott v. Nevius*, 6 *Duer*, 672; *v. Jones*, 18 *Id.*, 467; *Bramhall v. Ferris*, *Sillick v. Mason*, 2 *Barb. Ch.*, 79; *Ha-* 14 *N. Y. (4 Kern.)*, 41.  
*vens v. Healy*, 15 *Barb.*, 296; *Cruger*

## Creditors' Suits.

668. *By an Assignee of a Judgment;—against the Judgment-debtor and his Mortgagee of Personal Property, and an Assignee to whom, by a Fraudulent Agreement between them, the Debtor's Property, including the Mortgaged Property, had been Transferred.*

I. That on or about the            day of            , 18    , at            , in the            Court, in and for the county of            , one [*plaintiff's assignor*] recovered a judgment against [*the judgment-debtor*] for            dollars, which was duly given by said court, in an action,—*continue as in Form 663, to end of paragraph III.*

IV. That on the            day of            , 18    , the said [*plaintiff's assignor*] duly assigned to the plaintiffs for a valuable consideration said judgment, and all rights arising therefrom. (y)

V. That the said judgment was recovered upon debts of the said [*judgment-debtor*], contracted previous to the making of the transfer hereinafter mentioned.

VI. That the defendant [*judgment-debtor*] was a manufacturer of blank-books and stationery at            , and kept a store there stocked with blank-books and stationery, and a factory stocked with machinery and stock; the value of the said stock in the store being            dollars, and of the machinery and stock in the factory being            dollars, or thereabouts, the said machinery being subject to a chattel mortgage for            dollars, held by the defendants [*mortgagees*] under the firm-name of S. T. & Co., the said W. V. being the active and managing partner of said firm.

VII. That subsequent to the contracting of said debts, and about the month of            , 18    , the said [*judgment-debtor*] failed in business and stopped payment, and in anticipation of the said failure, and shortly previous thereto, he conspired with the defendant [*managing partner of mortgagees*], and the defendant [*assignee*], to dispose of his property in fraud of his creditors, and to conceal or cover up the same, so that his creditors could not reach it; and, in pursuance of this scheme, and with intent to delay and defraud the said creditors, the said

(y) It is not necessary to aver a new    *Edw.*, 509); *McArthur v. Hoysradt*, 11 execution. *Gleason v. Gage*, 7 *Paige*, *Paige*, 495; *Strange v. Longley*, 3 *Bar.* 121 (overruling *Wakeman v. Russel*, 1 *Ch.*, 650; *Hastings v. Palmer, Clarke*, 52

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To set aside Fraudulent Transfer between Debtor's Assignee and Mortgagee.

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[*mortgagee*] and [*assignee*], mutually arranged and agreed that after the transfer should be made to said [*assignee*], as hereinafter mentioned, the said mortgage should be foreclosed, and the property sold and bid in by the said [*mortgagee*], and that the deficiency then existing between the amount of the mortgage and the price bid should be paid to him by the defendant [*assignee*]; and the defendants [*debtor, mortgagee, and assignee*] further arranged and agreed that all the property in the said store and factory should be transferred and delivered to the defendant [*assignee*] at the nominal price of        dollars, or thereabouts, which the said [*assignee*] should pay in notes, and [*the debtor*] should use in effecting favorable compromises with his creditors. And it was further arranged and agreed between the defendants that the defendant [*assignee*] should go on, in his own name, with the business previously conducted by [*the debtor*], and should employ said [*debtor*] as managing agent, at a nominal salary of        dollars a year; that the business should be thus continued for two years, to give said [*debtor*] an opportunity to buy up at a low rate the claims against him held by his creditors, and at the end of that time said [*assignee*] should pay over and redeliver to the debtor all the residue of said property and effects, and the proceeds and profits thereof, after deducting        dollars a year for his own compensation and the amount of the notes given by him as aforesaid. And it was further arranged and agreed, that if the defendant [*debtor*] could procure a purchaser of said property at a fair price, the said [*assignee*] should sell the same to such purchaser in his own name, and after making the deduction above mentioned should pay over the balance to said [*debtor*].

VIII. That in pursuance of this arrangement the defendant [*mortgagee*] foreclosed the mortgage and bought in the property at        dollars, and immediately transferred the same to said [*assignee*], who paid him        dollars therefor, that being the amount of said mortgage; which amount the said [*mortgagee*] received for, and paid over to, the said firm of S. T. & Co.

IX. That also, in pursuance of said arrangement, the other property of said [*debtor*] in the factory and store was transferred by him to said [*assignee*] for        dollars, paid in notes as aforesaid, who continued the business, employing said [*debtor*]

## Creditors' Suits.

as managing agent, and the said [assignee] has made a large profit thereon, and at least                      dollars a year; and that the said [assignee] still continues in said business, and in possession of the said goods and property, or the proceeds and profits thereof.

Wherefore, the plaintiffs demand judgment:

1. That the transfer of his property by the defendant [debtor] to the defendant [assignee] may be adjudged fraudulent and void as against the plaintiffs.

2. That the said defendant [assignee] be enjoined and restrained from selling, assigning, or in any way disposing of the machinery and stock in said blank-book manufactory, transferred to him by said [debtor] or said [mortgagee], and the goods and stock in the store transferred to him by said [debtor], or the proceeds and profits thereof.

3. That a receiver may be appointed to take possession of the said property, and the proceeds and profits thereof.

4. That the said Y. Z. may be compelled to account to said receiver for the profits of said store and manufactory since the said transfer.

5. That the said [mortgagees] be compelled to pay over to said receiver                      dollars, being the sum received by them over and above the amount that the mortgaged machinery brought at the sale.

6. That the property taken possession of by said receiver, or collected by him, may be sold and appropriated to the payment of the judgment held by the plaintiffs.

7. And for the costs of this action.

669. *Against Judgment-debtor, and One to whom he Fraudulently Confessed Judgment;—to Set Aside Judgment and Sale thereunder.*

I., II., and III. *Allege judgment and execution, as 'in Form 662 or 663.*

IV. That, prior to the entry of said judgment, but after the indebtedness upon which the said judgment was rendered had accrued, the said defendant [debtor] authorized a judgment to be entered, on confession, in the                      Court for                      county, against him, in favor of the defendant [fraudulent creditor], the



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To set aside Fraudulent Judgment, and Sheriff's Sale thereunder.

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father of said [debtor], for                      dollars damages and dollars costs, for a pretended indebtedness for so much money alleged to have been theretofore lent by said defendant [debtor] to said defendant [*fraudulent creditor*].

V. That thereafter, and about the                      day of                      , 18                      , execution having been issued upon the said judgment, personal property of said [debtor], consisting of [*briefly describing it*], of the value of                      dollars, was thereunder sold by public auction by the sheriff of the said county of                      , and was struck off to said defendant [*fraudulent creditor*], at about                      dollars, a sum far less than its real value; who thereupon took possession, and is now in possession of the same, claiming to be the owner thereof.

VI. That afterwards, and about the                      day of                      , 18                      , real property of said [debtor], consisting of [*briefly describing it*], was sold by auction by the sheriff of said county, under an execution issued upon said judgment, and was struck off to the said defendant [*fraudulent creditor*], also at a price much below its real value, his being the highest bid for the same; and the said sheriff thereupon made his certificate of sale of the said real estate, to wit, on the                      day of                      , 18                      , aforesaid [and no deed or conveyance has yet been given by him, the time for such conveyance having not yet expired].

VII. That the said last-mentioned judgment was fraudulently confessed by the said [debtor] to the said [*fraudulent creditor*], and for the purpose of covering up his said property, and defrauding the plaintiff in the collection of his demand. That said defendant [debtor] was not indebted to the defendant [*fraudulent creditor*]; but said judgment was confessed without any consideration, and the sale of said property was made with the intention, on the part of both, of defrauding the plaintiff out of his demand, and of transferring the ostensible ownership and possession of the property of said [debtor], liable to execution, to the said defendant [*fraudulent creditor*], so as to prevent the plaintiff, or any other creditor, from levying upon and selling any part thereof. (2)

[VIII. That said real estate cannot be sold for more than about

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(2) In an action to set aside a judgment for fraud of creditors, a general averment of intent to hinder, &c., is not enough. *Meeker v. Harris*, 18 Cal., 278.

## Analysis of Section.

one-half the amount of the plaintiff's said judgment; and that the said defendant [*fraudulent creditor*] is of no pecuniary responsibility, and is possessed of little or no property other than that so bid in by him as aforesaid, and is in embarrassed circumstances and involved in debt.]

Wherefore the plaintiff demands judgment against the defendants:

1. That the said judgment in favor of the defendant [*fraudulent creditor*], and the proceedings and sale under it, and the sheriff's certificate of sale, be set aside, and declared void.

2. That the said defendants, and each of them, be enjoined from disposing of, transferring, incumbering, or in any way interfering with the said property, or any part thereof; and that a receiver be appointed, with the usual powers and duties, to whom the said defendants shall be directed to assign the said property, real and personal [and all other estate, property, and effects of said defendant, *debtor*]; and who shall be authorized and directed to sell the same, or so much thereof as shall be necessary for that purpose, and apply the proceeds, or so much thereof as may be necessary, to the payment of the plaintiff's said judgment, and interest thereon.

3. And for the costs of this action, and for such other or further relief as may be just.

## SECTION XXVII.

## COMPLAINTS IN ACTIONS TO RELIEVE AGAINST FRAUD OR MISTAKE. (a)

670. To annul a contract, for fraud.....	p. 585
671. To reform a conveyance by correcting mistake in boundary.....	586
672. To remove a mortgage which is a cloud upon title.....	587
673. For rescission of a contract and repayment of advances, on the ground of mistake.....	587
674. To correct an account stated.....	588.

(a) For a complaint in an action New Haven R. R. Co. v. Schuyler, 7 brought by a corporation to cancel certificates of stock falsely and fraudulent- *Abbotts' Pr.*, 41.  
For a complaint to set aside a judgment for fraud in obtaining it, see

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 Deed Obtained by Undue Influence or Fraud.
 

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670. *To Annul a Contract, for Fraud. (b)*

I. That on the                      day of                      , 18                      , the plaintiff was the owner of a farm situate in the town of                      , county of                      [briefly describing it].

II. That the plaintiff being then old, infirm, and blind, and by reason thereof incapacitated from attending properly to business, the defendants, on that day, fraudulently taking advantage of the plaintiff's said incapacity, procured him to sign a certain writing, without paying him any consideration therefor, and which writing they falsely and fraudulently represented to be a mere matter of form. (c)

III. That the plaintiff has since, and on the                      day of                      , 18                      , applied to the defendants for said writing, or for information as to the contents thereof; but the defendants refused to allow him to see said writing, or to give him any information concerning the same. That, as the plaintiff is informed and believes, the said writing is under seal, and is a deed of said premises, and conveys the same, or some interest therein, to the defendants; and that they intend to use the same for their own benefit, and to the prejudice of the plaintiff.

Wherefore, plaintiff asks judgment that the same is void; and that the defendant produce said writing, and deliver the same up to be cancelled; and for the costs of this action.

Crane v. Hershfelder, 17 Cal., 467; and for the same on the ground also of newly discovered evidence, see Munn v. Worrall, 16 Barb., 221; Hamel v. Grimm, 10 Abbotts' Pr., 150.

For the requisites of a complaint to restrain a corporation from enforcing a judgment, on the ground that it has ceased to be a corporation, see Sutherland v. Lagro & Manchester Plank-road Co., 19 Ind. (Kerr.), 192.

For the requisites of a complaint against the receiver of a mutual insurance company seeking to avoid plaintiff's notes given to the company, on the ground that the company was never duly organized, see Jones v. Dana, 24 Barb., 395.

For the requisites of a complaint by an infant after attaining majority to disaffirm and set aside his deed, see Voorhies v. Voorhies, 24 Barb., 150.

For a complaint to set aside sale by guardian as fraudulent, see Clark v. Underwood, 17 Barb., 202.

For a complaint to cancel note or bill in defendant's possession, see Gardner v. Lee's Bank, 11 Barb., 558.

(b) This form is supported by Johnson v. Wetmore, 12 Barb., 433.

(c) In imputing fraud, the term itself need not be used, if the facts stated amount to it. Attorney-general v. Corporation of Poole, 4 Myl. & C. (18 Eng. Ch.), 17; S. C., 8 L. J. (N. S.), ch. 27; 2 Jur., 934, 1080.

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 Actions for Equitable Relief against Fraud or Mistake.
 

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671. *To Reform a Conveyance by Correcting Mistake in Boundary.* (d)

I. That on the                      day of                      , 18    , the defendant executed and delivered to the plaintiff, under his hand and seal, a deed, of which the following is a copy: [*give copy of deed, containing, for example, the following description of premises conveyed: All that certain lot, &c., beginning at a point, &c., running thence easterly along A-street                      feet, thence southerly along B-street                      feet, thence westerly and parallel to C-street                      feet, and thence southerly and parallel to D-street                      feet to the place of beginning.*] (e)

II. That the description therein given of the premises intended to be conveyed thereby was erroneous, and in fact does not describe any premises whatever; that the word "southerly," as last used in said description, was inserted by mistake of the parties to said deed [*or otherwise; and if fraud is relied on, the circumstances of it should be specially stated*] instead of the word "northerly," which should have been used instead thereof; and that in order to make said deed pass any premises whatever to this plaintiff, and to make it conform to the actual intentions of the parties, it is necessary that the said description should be amended by substituting the word "northerly" for the word "southerly," where the latter word is last used therein [*or say, amended so as to read as follows, and insert description in full as amended*].

III. That the plaintiff has paid to the defendant for the said premises the consideration expressed in said deed.

Wherefore, this plaintiff demands judgment that said deed be reformed as aforesaid, and for the costs of this action.

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(d) For the allegations of a complaint seeking to reform a mortgage on the ground of fraud, and for foreclosure as reformed, see *DePeyster v. Hasbrouck*, 11 N. Y. (1 Kern.), 582.

(e) In an action on a written instru-

ment, in which the plaintiff alleges a mistake to exist, if he would seek a reformation of the instrument, he should state distinctly the facts entitling him to such relief. *Lamoreux v. Atlantic Ins. Co.*, 3 Duer, 680.

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 To Rescind Contracts.
 

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672. *To Remove a Mortgage which is a Cloud upon Title.*

I. That the plaintiff is the owner in fee-simple (*f*) of the following described premises, situated in [description].

II. [*Allege the making of the mortgage, or other apparent lien, stating facts which show that on its face it appears valid, and that in fact it is void. See other forms.*]

III. That said mortgage was, on the                      day of                      , 18                      , duly recorded in the office of the clerk [*or, register*] of said county, in Book                      of Mortgages, p.                      , and still remains unsatisfied of record, and a cloud upon the plaintiff's title.

Wherefore, the plaintiff demands judgment that the defendant give up said mortgage to be cancelled, and that the same be satisfied of record; and for the costs of this action.

673. *For Rescission of a Contract and Repayment of Advances, on the ground of Mistake.* (*g*)

I. That the plaintiff, on the                      day of                      , 18                      , bargained with the defendant to buy of the defendant a piece of ground at                      [*briefly designating it*], which was chiefly valuable for the purpose of dividing into city lots, and purchased by the plaintiff for that purpose, as defendant well knew.

II. That the defendant, well knowing said premises to contain a much less quantity than                      acres of land,—viz.,                      acres only,—then and there falsely and fraudulently represented to him that the premises contained                      acres; and falsely

(*f*) In an action to remove a cloud upon title, the complaint need not aver the source of plaintiff's title. Averring that he is owner is sufficient (*Lash v. Perry*, 19 *Ind.* (*Kerr.*), 322), without averring that he is in possession. *Donnelly v. Simmonton*, 7 *Minn.*, 167.

A complaint is not fatally defective which does not in terms allege that plaintiff has title, and that the instrument he seeks to cancel is a cloud, if

on a fair construction of the pleading, the facts are distinctly shown. *Williams v. Ayrault*, 31 *Barb.*, 364.

Title in fee is not necessary; a limited or an equitable estate may be alleged instead. *Craft v. Merrill*, 14 *N. Y.* (4 *Kern.*), 456; *Lounsbury v. Purdy*, 18 *N. Y.*, 515.

(*g*) This form is sustained by *Belknap v. Sealey*, 14 *N. Y.* (4 *Kern.*), 143; 2 *Duer*, 570.

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Actions for Equitable Relief against Fraud or Mistake.

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and fraudulently induced him to buy the said premises for dollars.

III. That plaintiff, relying on said representations, agreed to buy the premises, and paid defendant                      dollars, part of the purchase-money.

IV. That the premises did not contain                      acres, but only                      acres; whereby the plaintiff was deprived of all the benefit and advantage which he otherwise would have derived from the said sale.

V. That on or about the                      day of                      , 18                      , as soon as he had ascertained that the said representations were untrue; he demanded of defendant a return of said                      dollars, which defendant refused and still refuses.

Wherefore, the plaintiff demands judgment:

1. For                      dollars, with interest from the                      day of                      , 18                      .
2. That the said agreement of purchase be delivered up and cancelled.
3. For the costs of this action.

674. *To Correct an Account Stated.*

I. That the plaintiff and defendant, having had mutual dealings, afterwards, on the                      day of                      , 18                      , came to a mutual accounting, upon which a statement of the said account was made in writing, of which a copy is annexed as a part of this complaint, whereby a balance of                      dollars was found to be due from the plaintiff to the defendant [*or, from the defendant to the plaintiff*] on final adjustment.

II. That since the said statement of account the plaintiff has discovered errors and false charges [*or, credits, or both*] therein, of which he was wholly ignorant at the time of such settlement.

III. That in the statement of said account so settled he is charged [*here state the items wrongfully charged, and show what is the error*].

IV. That the following items, which ought to have been entered to his credit in said account, were wholly omitted therefrom, by mistake and oversight, to wit: [*here set forth the items, with date, amount, &c.*]

V. That the following items are erroneous in amount, in this:

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 For Correction of Account Stated.
 

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that the credit for                    should have been of                    dollars, instead of only                    dollars [*stating briefly the grounds why it should have been more*].

VI. That the said account ought to be corrected as above mentioned; and the balance thereon ought to be                    dollars in favor of the [plaintiff], instead of being                    dollars in favor of the [defendant].

VII. That as soon as the plaintiff discovered the said mistakes and errors, he called on the defendant, on the                    day of                   , 18                   , and pointed the same out to him, and then requested the defendant to correct the same, and to restate the said account, with the mistakes and errors aforesaid corrected; but the defendant refused to do so, or to pay the plaintiff any part of said sum of                    dollars, due to him at the time said account was stated [*or, and to accept the sum of                    dollars from the plaintiff in full payment of said account*].

Wherefore, the plaintiff asks:

1. That he may be let in to prove the said errors and mistakes in the stating of the said account.

2. That judgment may be rendered against the defendant for the balance of                    dollars, due him on said corrected account, with interest thereon from the                    day of                   , 18                   .

Together with costs of this action.

## SECTION XXVIII.

### COMPLAINTS IN ACTIONS FOR SPECIFIC PERFORMANCE, OR TO ENFORCE VENDOR'S LIEN.

#### I. SPECIFIC PERFORMANCE.

675. Vendor against purchaser..... p. 590  
 676. Purchaser against vendor;—claiming interest on purchase-money which has lain idle, and deduction for deficiency and for outstanding incumbrance..... 591  
 677. On an exchange, the parties having taken possession..... 594  
 678. By creditor, for performance of agreement to give a chattel-mortgage..... 595

#### II. VENDOR'S LIEN.

679. By vendor against purchaser, and his grantee and judgment-creditors,—to enforce lien for purchase-money ..... 595

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 Actions for Specific Performance.
 

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## I. SPECIFIC PERFORMANCE.

675. *Vendor against Purchaser.* (a)

I. That on and before the                      day of                      , 18                      , the plaintiff was, and still is, the owner in fee [*or otherwise*] and possessed of certain real property hereinafter described.

II. That the defendant, being desirous to purchase the same, entered into an agreement in writing with the plaintiff, (b) dated on that day, of which the following is a copy: (c) [*copy of contract, giving a description of the property.*] (d)

[III. That the defendant then paid to the plaintiff                      dollars as a deposit, and in part of the purchase-money mentioned therein.]

IV. That the plaintiff has always been, and still is, ready and willing to perform the agreement on his part; and, on being paid the remainder of said purchase-money [*with interest*], to convey [*&c., as by the agreement*], and to let the defendant into possession of said premises, and the rents and profits thereof, from the time in the agreement specified. (e)

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(a) A claim for a specific performance of a contract to convey land, and for payment of a reasonable sum for its use while in possession under the contract, constitutes one cause of action. *Spier v. Robinson*, 9 *How. Pr.*, 325.

(b) If the contract be alleged to be in writing, it is not necessary to allege it to be signed by the party, but it will be presumed to be so signed. *Stor. Eq. Pl.*, 262, § 253.

Execution by the plaintiff is not essential. *Clason v. Bailey*, 14 *Johns.*, 484; *Worrall v. Munn*, 5 *N. Y.* (1 *Seld.*), 229.

For the proper allegations to state a sale at auction, see Form 471, *ante*, p. 382.

(c) If the written agreement does not in fact contain the true agreement between the parties, and the plaintiff wishes to introduce parol proof to correct it, he should not merely state the

agreement as it ought to have been reduced to writing, but he should also state the substance of the written agreement, and must show wherein it differs from the one actually made. *Coles v. Bowne*, 10 *Paige*, 526.

(d) The complaint in an action for specific performance should supply the details necessary to guide in drawing a judgment directing a conveyance; but it is not bad on demurrer if it fails to do so. *Richards v. Edick*, 17 *Barb.*, 260.

(e) Specific performance may be decreed, with costs, though the complainant's title was not perfect when the bill was filed, if it appear before decree or report that it can be perfected. The delay is compensated by charging the complainant with interest. *Clute v. Robison*, 2 *Johns.*, 595; *Pierce v. Nichols*, 1 *Paige*, 244; *Brown v. Haff*, 5 *Id.*, 235; *Reformed Dutch Church v. Mott*,



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 Purchaser against Vendor.
 

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V. That on the                    day of                    , 18    , at                    , the plaintiff duly tendered to the defendant a deed of the premises, (*f*) pursuant to the agreement; but the defendant, then and ever since, has refused to accept the same and to pay the balance of the purchase-money [*or*, and to give the bond and mortgage agreed for, *or otherwise, according to the contract*].

Wherefore, the plaintiff demands judgment that the defendant perform said agreement, and pay to the plaintiff                    dollars, the remainder of said purchase-money, with interest from the                    day of                    , 18    , the time when it ought to have been paid [*or*, and give to the plaintiff the bond and mortgage, &c.]; and for the costs of this action.

[2. That if the defendant will not accept the conveyance, and pay said purchase-money, then the premises be sold, and the proceeds be applied to the payment of the same, with the costs of this action; and that the defendant be required to pay the deficiency, if any.] (*g*)

676. *Purchaser against Vendor;—Claiming Interest on Purchase-money which has lain Idle, and Deduction for Deficiency and for Outstanding Incumbrance.*

I. That on the                    day of                    , 18    , the defendant being owner in fee [*or otherwise*] and possessed of certain real property hereinafter described, and desirous to dispose of the same, (*h*) made [by one M. N., his agent, duly authorized there-

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7 *Id.*, 77; *Viele v. Troy & Boston R. R. Co.*, 21 *Barb.*, 381; affirmed, 20 *N. Y.*, 184; *Cleveland v. Burrill*, 25 *Barb.*, 532.

(*f*) In an action by a vendor for specific performance, no previous tender of a deed is necessary where the purchaser has abandoned possession and given notice of his refusal to perform. *Crary v. Smith*, 2 *N. Y.* (2 *Comst.*), 60.

(*g*) This clause is not essential.

(*h*) It is usual to aver that defendant was owner at the time of the contract, but an averment of ownership at the time of bringing the action would be

sufficient. *Allerton v. Johnson*, 3 *Sandf. Ch.*, 72. Compare *Tucker v. Clarke*, 2 *Id.*, 96.

Where the vendor retains the legal title as a lien for his security for unpaid purchase-money, and subsequently dies without completing the contract, the complaint, in an action by the purchaser against the heirs for specific performance, need not allege that the vendor died seized of the property in question, or that the title to the premises is vested in the defendants by descent or otherwise. *Moore v. Burrows*, 34 *Barb.*, 173.

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 Actions for Specific Performance.
 

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to] an agreement in writing with the plaintiff, of which the following is a copy: [*copy of the agreement.*]

[II. That on the execution thereof the plaintiff paid to the defendant .                      dollars as a deposit, and in part of the purchase-money therein mentioned.]

[III. That afterwards, by mutual agreement between the plaintiff and the defendant, the time for completing said contract was extended to the                      day of                      , 18                      .]

IV. That the plaintiff [duly performed all the conditions thereof on his part, and] has always been ready and willing, and still is, to fulfil the agreement on his part; and, on having a good and marketable title made of said premises, and a conveyance of the fee thereof, free from all incumbrances [*or otherwise, according to the contract*], to pay the residue of the purchase-money to the defendant [and to give the bond and mortgage agreed for].

V. That on the day last mentioned, at                      , the plaintiff duly tendered to the defendant said sum, and requested such a conveyance<sup>(i)</sup> [and offered to give the bond and mortgage agreed for, on receiving the same]; but the defendant refused, and still refuses, to execute or deliver such conveyance.

[*Where purchase-money lay idle.*] VI. That                      dollars, the residue of said purchase-money, has been ready and unproductive in the hands of the plaintiff, for completing the purchase, ever since the said day on which it ought to have been completed.

[*Where there is a deficiency.*] VII. That since the making of said agreement the plaintiff has discovered that there is a deficiency in the quantity (<sup>j</sup>) of said                      , and that the same does not contain                      acres, but only                      acres. (<sup>k</sup>)

[*Where a claim of a right of way proved unfounded.*] VIII. That at the time of treating for said contract said [*defendant or agent*] represented to the plaintiff that there belonged to the said estate a right of way from the said estate to                      street, and that the said [*defendant*] could make a good title in fee to

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(i) A request is not essential to be averred, even in an agreement to convey on request. *Bruce v. Tilson*, 25 N. Y., 194.

(j) Or state mistake in the bound-

aries, according to the fact. See *Voorhees v. De Meyer*, 3 Barb., 37.

(k) This and the next succeeding allegation are supported by *Whitro. Eq. Pr.*, 225.

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 Claim for Reduction on Price.
 

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the said right of way, which said right of way rendered the said estate very convenient for the business which the plaintiff intended to carry on upon the said premises; and that before the agreement of the said                    day of                   , 18                   , was signed, a certain plan made for the purpose of showing how buildings might be erected on the said estate, was shown to the plaintiff by the said [*defendant or agent*], and upon that building-plan the said right of way was delineated; and by the said building-plan, and the representations of the said [*defendant or agent*], the plaintiff was led to expect that he should have a right of way directly from the said estate to                    street, and the expectation of having such right of way was a great inducement to the plaintiff to purchase the said estate, and when the said agreement was signed, the said building-plan was delivered to the plaintiff, and the same is now in the plaintiff's possession; but since the signing of the said agreement one [*an adverse claimant*] has claimed to be exclusively entitled to the said right of way, and she brought an action in the                    Court for the recovery of the possession thereof, and in that action she obtained a verdict, and she has recovered possession of the said road or way from the said estate to                    street, and she has since sold the same, and that the plaintiff is now prohibited from using the said road or way; and that the plaintiff, in the expectation that he should have a good title made to the said estate, entered into the possession thereof soon after signing the said agreement, and has ever since been, and now is, in possession thereof, and has, at a great expense,—to wit,                    dollars,—purchased a piece of ground, and made a road from the estate to                    street.

[*Where there is an outstanding incumbrance.*] IX. That the defendant's title to the premises is incumbered by a mortgage to one M. N. for                    dollars, with interest semi-annually, which mortgage is not payable until the                    day of                   , 18                   .

Wherefore, the plaintiff demands judgment:

1. That a just deduction from the purchase-money be made on account of said deficiency, and on account of the plaintiff not having the benefit of said right of way, and on account of said incumbrance, and for interest on plaintiff's purchase-money which has lain idle; and that on payment of the residue of said

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 Actions for Specific Performance.
 

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purchase-money [and on the delivery of such bond and mortgage] the defendant specifically perform said agreement.

2. That if he cannot make good title he pay to the plaintiff dollars, his said deposit, interest, and expenses, made and incurred under said agreement.

3. For the costs of this action.

*677. On an Exchange, the Parties Having Taken Possession.*

I. That on the            day of           , 18   , the plaintiff and the defendant entered into an agreement in writing, dated that day, whereby, in consideration (*l*) of the covenants on the part of the plaintiff hereinafter mentioned, the defendant covenanted that he would, on or before the            day of           , 18   , convey to the plaintiff in fee by warranty deed, and with covenants for quiet enjoyment and against incumbrances [*or otherwise, according to the agreement*], a lot of land, situate in the town of           , and county of           , in the State of           , and described as follows: [*description of premises.*] In consideration whereof, the plaintiff covenanted in and by said agreement [*state his covenant in same manner*]. And it was further provided in said agreement that each party might enter into immediate possession of the premises so to be conveyed to him, and have and receive the profits to his own use.

II. That thereafter, in pursuance of said agreement, the plaintiff and the defendant respectively took possession of the premises so to be conveyed to them, and still severally occupy the same.

III. That the plaintiff duly performed all the conditions of said contract on his part, and, on the            day of           , 18   , tendered to the defendant a warranty deed of said premises in           , with covenants for quiet enjoyment and against incumbrances, duly signed and sealed by the plaintiff, and demanded of him a deed of said premises in           ; but the defendant refused to execute and deliver such to the plaintiff, and still neglects so to do.

Wherefore, the plaintiff demands judgment that the defend-

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(*l*) Voluntary covenants are not specifically enforced. *Hayes v. Kershaw*, 1 *Sandf. Ch.*, 258.

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 To Enforce Vendor's Lien.
 

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ant convey to the plaintiff said lot in \_\_\_\_\_, pursuant to the contract; and for the costs of this action.

678. *By Creditor, for Performance of Agreement to Give a Chattel Mortgage.* (n)

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the plaintiff and the defendant entered into an agreement whereby the plaintiff, then being the owner of [*designate the goods*], situate in the house No. \_\_\_\_\_, in \_\_\_\_\_ street, agreed to sell and deliver the same to the defendant; in consideration whereof, the defendant promised to pay him \_\_\_\_\_ dollars cash upon the delivery of said [*goods*], and \_\_\_\_\_ dollars, \_\_\_\_\_ months from the date of said delivery, and to give on the delivery of such [*goods*] a chattel mortgage thereon to the plaintiff to secure the payment of said \_\_\_\_\_ dollars.

II. That pursuant to said contract the plaintiff, on the day of \_\_\_\_\_, 18\_\_\_\_, delivered said [*goods*] to the defendant, who is now in possession thereof, and who paid him the sum of \_\_\_\_\_ dollars, but failed to deliver to him a chattel mortgage thereon, pursuant to said agreement; and although afterwards, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, requested to deliver such chattel mortgage to plaintiff, he refused so to do.

Wherefore, the plaintiff demands judgment that the defendant execute and deliver to the plaintiff a chattel mortgage on said [*goods*], pursuant to said contract; and for the costs of this action.

## II. VENDOR'S LIEN.

679. *By Vendor against Purchaser, and his Grantee and Judgment-creditors;—to Enforce Lien for Purchase-money.* (n)

I. That the plaintiff, being owner in fee [*or otherwise*] of the real property hereinafter described, did, on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, sell the same to the defendant [*naming purchaser*] for the sum of \_\_\_\_\_ dollars, and thereupon by his deed conveyed the same to the defendant [*in fee*], which prem-

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(n) This form is sustained by St. John v. Griffith, 2 *Abbotts' Pr.*, 198.

(n) This form is, in substance, from *Nash's Pl. & Pr.*, 353.

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 Actions for Specific Performance.
 

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ises are [bounded and] described as follows: [*full description, as in deed*].

II. That the said [*purchaser*] has paid the plaintiff dollars, part of said purchase-money [*and state what security, if any, was given for the rest,—e. g., thus :*] and on the day of , 18 , gave to the plaintiff his promissory note for dollars, the residue thereof, payable on the day of , 18 ; but that no part [of said note or] of the residue of said purchase-money has been paid, though, on the day of , the plaintiff duly demanded the same of said [*purchaser*].

III. That the said [*purchaser's grantee*] purchased of the said [*purchaser*] a portion of said premises, with the full knowledge that the said [*purchaser*] had not paid the balance of said purchase-money, and took a conveyance from the said [*purchaser*] to him for the said premises so by him purchased of the said [*purchaser*].

IV. That the said [*judgment-creditor*] claims to have recovered judgment against the said [*purchaser*] for about dollars, on the day of , 18 , in the court, and has caused execution to be issued thereon, and is proceeding to sell the part of said premises not sold to the said [*purchaser's grantee*]; whereby the said plaintiff will wholly lose the balance of the said purchase-money, as the said [*purchaser*] is wholly insolvent, and unable to pay the same.

Wherefore, the plaintiff demands judgment :

1. Against the said [*purchaser*] for the said sum of dollars, together with interest thereon from the day of , 18 , and the costs of this action.

2. That in case the said [*purchaser*] shall not pay the said judgment by a short day to be named, the said premises may be sold, and so much of the proceeds as may be necessary be applied to the payment of the judgment so to be rendered.

## Analysis of Section.

## SECTION XXIX.

## COMPLAINTS IN ACTIONS FOR FORECLOSURE. (a)

680. Mortgagee against mortgagor and junior incumbrancers;—to foreclose upon default in interest clause, adding claim for insurance premium paid by mortgagee, and for outstanding judgment.....p. 597
681. Assignee of mortgagee, against mortgagor,—mortgagee who on assigning guaranteed payment,—grantee of equity of redemption, who assumed the mortgage,—and junior incumbrancers ..... 600
682. Allegation of inadequacy of security, and demand for receiver of rents and profits. .... 601
683. Mortgagee in possession, against parties entitled to redeem;—seeking an accounting and payment, or strict foreclosure..... 601
684. Short form, on a note and mortgage ..... 603

680. *Mortgagee against Mortgagor and Junior Incumbrancers;—to Foreclose upon Default in Interest Clause, Adding Claim for Insurance Premium paid by Mortgagee, and for Outstanding Judgment.*

I. That on the                      day of                      , 18                      , the defendant [*mortgagor*] made his bond to the plaintiff (*b*) under seal, and dated on that day, conditioned to pay to the plaintiff                      dollars on [*stating condition of bond*]; and thereupon he [together with the defendant, *naming his wife*] duly made and acknowledged (*c*) his [*or, their*] mortgage to the plaintiff, of even date therewith, as collateral, to secure the payment of said bond, a copy of which is annexed as a part of this complaint (*d*) [*or*

(a) As to the action by one who stands in the position of surety for the mortgage debt to compel payment or a foreclosure, see *Marsh v. Pike*, 10 *Paige*, 595; *Lawrence v. Lawrence*, 3 *Barb. Ch.*, 71; *Cornell v. Prescott*, 2 *Barb.*, 16; *Hoag v. Rathbun*, *Clarke*, 12; *Vanderkemp v. Shelton*, 11 *Paige*, 28.

(b) The indebtedness for which the mortgage was given need not be set forth. *Day v. Perkins*, 2 *Sandf. Ch.*, 359. It would be otherwise where the mortgage was to secure an uncertain amount,—*e. g.*, future advances, or a contingent liability.

(c) We deem this allegation sufficient as to a married woman's deed. *Roy v. Bremond*, 22 *Texas*, 626; *Kays v. Phelan*, 19 *Cal.*, 128. But compare *Johnston v. Taylor*, 15 *Abbotts' Pr.*, 359.

(d) In Indiana, the mortgage, &c., must be made part of the complaint. *Hiatt v. Goblt*, 18 *Ind. (Kerr.)*, 494.

In California, the complaint in a foreclosure action, as distinguished from an action to recover lands, may refer to a copy of the mortgage annexed, for a description of the land. *Emeric v. Tams*, 6 *Cal.*, 155.

As to variance between the pleading

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 Actions for Foreclosure.
 

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*allege its legal effect as follows:* and that by said mortgage he, or, they] granted, bargained, and sold to the plaintiff, his heirs and assigns, the following described premises: [*insert description of premises from mortgage*], which conveyance was nevertheless upon the condition that [*state condition of mortgage, with interest and insurance clauses*].

II. That said mortgage was duly acknowledged, and on the day of                   , 18   , duly recorded in the office of the clerk of           county, in Book           of Mortgages, page           . (e)

III. That the interest on said bond and mortgage, which became payable on the           day of           , 18   , is still due and unpaid; that more than           days have elapsed since said interest became due and payable, and the plaintiff elects to deem the whole principal sum to be immediately due and payable; and there is now justly due to him on said bond and mortgage dollars, with interest from the           day of           , 18   , at           per cent. per annum. (f)

[*Where plaintiff has paid insurance, &c.*] IV. That the defendant [*mortgagor*] did not keep the premises insured [*stating breach of the insurance covenant,—e. g., thus*],—but wholly neglected so to do [*or, but on the contrary suffered the insurance to expire on the           day of*]; in consequence whereof the plaintiff caused them to be insured in the           Company of           for the term of           from the           day of           , 18   , and paid therefor the premium of           dollars.

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and the mortgage, see *Sears v. Barnum, Clarke*, 139.

(e) As against the mortgagor, this allegation is immaterial and unnecessary; and an answer, taking issue only upon it, is frivolous. *St. Mark's Fire Ins. Co. v. Harris*, 13 *How. Pr.*, 95. A complaint in foreclosure against the mortgagor alone, need not aver acknowledgment or record (except in the case of a married woman), nor that the mortgagor has not conveyed. *Perdue v. Aldridge*, 19 *Ind. (Kerr.)*, 290; *Culph v. Phillips*, 17 *Id.*, 209.

In foreclosure against a subsequent purchaser, the complaint should allege that the mortgage was recorded, or that defendant had notice when he

purchased. *Peru Bridge Co. v. Hendricks*, 18 *Ind. (Kerr.)*, 11.

(f) A mortgage payable generally may be foreclosed at once, and without any demand of the debt. *Gillett v. Balcom*, 6 *Barb.*, 370.

Even where there is no place appointed, in a bond or mortgage, at which the principal or interest is to be paid, a demand is not necessary before suit brought. *Harris v. Mulock*, 9 *How. Pr.*, 402. The English practice seems to be different. *Whitv. Eq. Prec.*, 395, note 7.

A guarantor or surety of a mortgage is not entitled to notice or demand, before making him a party to a foreclosure. *Rushmore v. Miller*, 4 *Edw.*, 81.



## Mortgagee against Mortgagor.

[V. That no proceedings have been had, at law or otherwise, for the recovery of said moneys, or any part thereof [except that heretofore the plaintiff commenced an action in this court against the defendant to recover on a promissory note for dollars, which formed a part of the indebtedness for which said bond and mortgage was given, and on the      day of      , 18      , judgment of nonsuit was given against the plaintiff on the ground that the mortgage merged the note.] (g)

[Where plaintiff holds other liens.] VI. That on the      day of      , 18      , at      , in the Court of      [or, before M. N., a justice of the peace in and for the town of      ], the plaintiff recovered a judgment, which was duly given by said court [or, justice] against the defendant, for      dollars, in an action wherein this plaintiff was plaintiff [or, defendant], and the defendant herein was defendant [or, plaintiff]; and which was on the      day of      , 18      , duly docketed in the office of the clerk of said county, so as to become, and still remains, a lien on the mortgaged premises. (h)

VII. That the defendants [subsequent incumbrancers] have or claim some interest in, or lien on, said mortgaged premises, accrued since the lien of said mortgage. (i)

(g) Under the former procedure, if proceedings had been had, the complaint should show that the remedy at law had been exhausted, and with what effect. *Shufelt v. Shufelt*, 9 *Paige*, 137; *Lovett v. German Reformed Church*, 12 *Barb.*, 67; but proceedings at law were not necessarily a bar to the foreclosure. *Williamson v. Champlin*, 8 *Paige*, 70; *Suydam v. Bartle*, 9 *Id.*, 294.

An allegation on this point was required by 2 *Rev. Stat.*, 191, § 155; and is usual still, but under the Code it is not necessary; if there have been any proceedings, they are to be set up in defence. *Newton v. Newton*, 12 *Ind.*, 527.

(h) Where the plaintiff has also other liens subsequent in date to the mortgage, it is proper to make a claim for payment of them, in his bill to fore-

close the mortgage. *Wheeler v. Van Kuren*, 1 *Barb. Ch.*, 490; *Tower v. White*, 10 *Paige*, 395. Perhaps, however, it is not necessary to do so. *Field v. Hawxhurst*, 9 *How. Pr.*, 75.

(i) This allegation is sufficient against defendants who claim subsequent to the plaintiff's mortgage. What those rights are, is only important in a contest as to the surplus. *Lewis v. Smith*, 9 *N. Y. (5 Seld.)*, 502; *Drury v. Clark*, 16 *How. Pr.*, 424. But a decree against defendants, made parties under such general allegations, does not bar rights which are paramount to the title of both mortgagor and mortgagee. *Lewis v. Smith*, 9 *N. Y. (5 Seld.)*, 502; 11 *Barb.*, 152.

If there are incumbrancers which the plaintiff insists are subsequent to his mortgage, but who claim to have a prior equity,—*e. g.*, where the plaintiff

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 Actions for Foreclosure.
 

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Wherefore, the plaintiff demands judgment :

1. That each of the defendants, and all persons claiming under them, or either of them, subsequent to the commencement of this action, may be foreclosed of all equity of redemption or other interest in said mortgaged premises.

2. That the same be sold, and the proceeds applied to the payment of the costs and expenses of this action, and the amount due on said bond and mortgage, and the amount of said premium of insurance [and of said judgment], with interest on said moneys up to the time of such payment.

3. That the defendant [*mortgagor*] may be adjudged to pay any deficiency that may remain after applying all of said moneys so applicable thereto.

681. *Assignee of Mortgagee, against Mortgagor,—Mortgagee who, on Assigning, Guaranteed Payment,—Grantee of Equity of Redemption, who Assumed the Mortgage,—and Junior Incumbrancers.*

I. and II. *As in preceding form, substituting the mortgagee's name for the words "the plaintiff."*

III. That on the            day of           , 18   , the defendant [*mortgagee*], by an instrument in writing under his hand and seal, duly assigned said bond and mortgage to the plaintiff for value, and thereby [and for a consideration expressed therein] guaranteed to the plaintiff the payment of said bond and mortgage [*or*; which assignment contained a covenant, of which the following is a copy, *setting it forth*].

IV. That on the            day of           , 18   , the defendants, [*mortgagor*] and [*his grantee*], entered into an indenture under their hands and seals, whereby the said [*mortgagor*] conveyed to said [*grantee*] the mortgaged premises, subject to said mortgage, and said [*grantee*] covenanted that he would pay off and

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claims to have become mortgagee in good faith without notice of a prior claim,—the facts must be specially stated. *Potter v. Crandall, Clarke*, 119; *Bank of Orleans v. Flagg*, 3 *Barb. Ch.*, 316.

If there are infant defendants, the complaint must state what their interest is, and whether it is paramount or subordinate to the interest mortgaged. *Aldrich v. Lapham*, 6 *How. Pr.*, 129.

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Demand for Receiver. Action for Payment or Strict Foreclosure.

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discharge the same as a part of the consideration of said conveyance [*or otherwise, as the covenant was*].

*Or, where the conveyance subject to the mortgage was not signed by the grantee, IV.* That on the            day of           , 18   , the defendant [*mortgagor*], by deed dated on that day, duly conveyed said premises, subject to said mortgage, (*j*) to the defendant [*owner of equity of redemption*]; which deed contained a covenant on the part of the latter, of which the following is a copy: [*copy of covenant to assume mortgage.*] And said conveyance thereupon was accepted by said [*grantee*].

*Continue as in preceding form.*

682. *Allegation of Inadequacy of Security, and Demand for Receiver of Rents and Profits.*

*Insert in either preceding form:*

That the mortgaged premises consist of [*briefly stating situation,—e. g.,*] a single village lot, with a house thereon, which is old and out of repair, and rapidly deteriorating; and the present value of the premises is about            dollars, and they are subject to a prior mortgage, on which about            dollars is due. That they are a scanty and insufficient security for the plaintiff's mortgage debt, (*k*) and the defendants, who are personally liable therefor, are insolvent.

*And insert in the prayer for relief:*

That a receiver of the rents and profits be appointed, by order of the court, to apply the same to the plaintiff's demand.

683. *By Mortgagee in Possession, against Parties Entitled to Redeem;—Seeking an Accounting, and Payment, or Strict Foreclosure. (l)*

*[Allege mortgage, default, &c., as in preceding forms.]*

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(*j*) Even where the grantee did not assume the mortgage, but merely took subject to it, it may be well to allege that his grant was expressed to be subject to the mortgage, to preclude him from interposing an allegation of usury. See *Hetfield v. Newton*, 3 *Sandf. Ch.*, 564

(*k*) The allegation should be, that the premises are an inadequate security for plaintiff's demand. An allegation that they are not sufficient "for all just incumbrances," was held not enough *Warner v. Gouverneur*, 1 *Barb.*, 36.

(*l*) This form is from 2 *Van Santo. Eq. Pr.*, 528, *app.*

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Actions for Foreclosure.

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III. That after the mortgage debt became due as aforesaid, the plaintiff entered into possession of the mortgaged premises, and the receipt of the rents and profits thereof, and has since continued, and still is, in possession.

IV That the said rents and profits have not been sufficient in amount to equal the annual interest upon the said bond and mortgage [*or state otherwise, as the fact may be*].

V. That the plaintiff has laid out considerable expenditures for permanent improvements upon said premises, to wit: [*stating the general nature and value of same*], which he claims should be allowed him as an offset against so much of said rents and profits. And has also paid the sum of            dollars for taxes and assessments [*or, if any prior lien has been discharged, state the nature of the lien, amount, and time of payment of same*]; all of which sums the said plaintiff also claims should be allowed him, and credited on his account against so much of said rents and profits; which several sums, when so applied and credited to the said plaintiff, charging the plaintiff with the amount of rents and profits so received by him, will leave remaining due to said plaintiff, on his said bond and mortgage, about            dollars.

VI. That the defendant [*junior incumbrancer*] has, or claims, an interest in said mortgaged premises, under and by virtue of a mortgage thereon from the said defendant [*mortgagor*] subsequent to the mortgage of the plaintiff; and the defendant            has, or claims, an interest therein, &c., &c. [*setting forth generally the interests of the respective parties*].

VII. That the plaintiff has applied to the said defendants [*junior incumbrancers*], and requested them to pay the plaintiff the said sum so due on the bond and mortgage held by the plaintiff, or come to an accounting with him thereon for the said rents and profits [*permanent improvements and advances*]. and, after the proper charges and credits, pay the said plaintiff what should appear to be due him on his said bond and mortgage; or, in default thereof, to release their right and equity of redemption in said mortgaged premises. But the said defendants have hitherto refused, and still refuse so to do, or to comply with any part of said plaintiff's request.

Wherefore, the plaintiff demands judgment:

1. That an account may be taken of what, if any thing, is due

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 Short Form, on Note and Mortgage.
 

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and owing to the plaintiff for principal and interest on his said bond and mortgage; and that an account may also be taken of the rents and profits of the said mortgaged premises which have been received by said plaintiff, and also of the expenditures of the said plaintiff for permanent improvements, and for taxes and assessments [*or, for the amount so paid for prior incumbrances, &c., as the case may be*].

2. That the said defendants pay the plaintiff what may be found due him on taking the said account, together with his costs of action, by a short day to be appointed by the court for that purpose; or, in default thereof, that the said defendants, and all persons claiming under them, be absolutely debarred and foreclosed of and from all right and equity of redemption in and to the said mortgaged premises, and every part thereof, and that said defendants deliver up to the plaintiff all deeds, papers, or writings in their custody or power relating to or concerning the said mortgaged premises, or any part thereof; and for such further relief as may be just, with costs of this action.

#### 684. *Short Form, On a Note and Mortgage. (m)*

I. That on the                    day of                   , 18   , the defendant made his promissory note of that date, and thereby promised to pay to plaintiff, or order,                    dollars,                    years after said date, for value received.

II. That the defendant, on the                    day of                   , 18   , to secure the payment of said note, executed to the plaintiff his mortgage deed, and thereby conveyed to the plaintiff, his heirs and assigns, the following lands and tenements, situate in said county of                    [*description as contained in the deed*]. The condition contained in said mortgage deed was, in substance, that if [*here set forth the condition*].

III. That on the                    day of                   , 18   , at                    o'clock A. M. [*or, P. M.*], said mortgage was delivered to the recorder of

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(m) This form is from *Swan's Pl.*, 414. and the indorser, the original mortgagee cannot be joined in the same count.

It was held in *Sands v. Wood* (1 *Clarke (Iowa)*, 263), that in a proceeding to foreclose a mortgage, or to enforce payment, both from the maker The practice in this State regards the foreclosure as a single cause of action against all parties.

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 Actions to Redeem from Mortgages.
 

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said county, to be by him entered on record, and was recorded the same day [*according to facts*].

IV. That the said deed has become absolute; and there is due and remaining unpaid upon said indebtedness the sum of \_\_\_\_\_ dollars, with interest from the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_.

Wherefore, the plaintiff asks that said mortgage may be foreclosed, the said premises ordered to be sold, and the proceeds applied to the payment of said debt, and execution awarded for the balance.

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## SECTION XXX.

## COMPLAINTS IN ACTIONS TO REDEEM MORTGAGED PREMISES. (a)

685. By mortgagor against mortgagee .....	604
686. By lessee .....	605

685. *By Mortgagor against Mortgagee.*

I. That on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_, the plaintiff having made to the defendant a bond under his hand and seal, dated that day, conditioned to pay, &c. [*state condition of bond*], and, being owner in fee [*or otherwise*] of the premises hereinafter described, made to the defendant a mortgage of even date therewith, to secure the payment thereof, whereby the plaintiff granted, bargained, and sold to the defendant the said premises, upon the condition nevertheless that [*state condition of the mortgage*], which said premises are [bounded and] described as follows: [*insert description from mortgage*.]

II. That the plaintiff has paid to the defendant all the interest due on said \_\_\_\_\_ dollars, from the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_, up to the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_; and that, on the \_\_\_\_\_ day of \_\_\_\_\_, 18 \_\_\_\_, when [*or, and after*] the said mortgage became due, he tendered to the defendant the sum of \_\_\_\_\_ dollars, together with all interest [and costs] due there-

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(a) For the form of a complaint to ascertain and declare the rights of adverse claimants to real property, to allow redemption from a mortgage, to restrain foreclosure of a mortgage, and for the appointment of new trustees under a trust-deed to fill the place of trustees who had renounced, see *Woodgate v. Fleet*, 9 *Abbotts' Pr.*, 222.

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 Lessee's Action to Redeem from Mortgage.
 

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on, and has ever since been ready and willing to pay the same; but the defendant refused to receive the same or to deliver up said mortgage to be cancelled.

Wherefore, the plaintiff demands judgment that an account be taken of the amount now due the defendant on said bond and mortgage for principal, interest [and costs]; and that the plaintiff may be at liberty to redeem said mortgaged premises upon payment of whatever may be found so due; (b) and that the defendant, upon payment thereof, acknowledge satisfaction of said mortgage, and discharge the same of record.

686. *By Lessee.*

I. That on the                    day of                    , 18    , the defendant [mortgagor] being the owner in fee of the following described premises, leased the same to the plaintiff by an indenture dated on that day, a copy of which is annexed as a part of this complaint; and that by virtue of said lease the plaintiff entered upon, and ever since has been, and still is, in possession of said premises, and is vested with the unexpired term thereof; which premises are [bounded and] described as follows: [description.]

II. That on the                    day of                    , 18    , said [mortgagor] made to the defendant [mortgagee] a mortgage upon the same premises, to secure                    dollars, payable on the                    day of                    , 18    .

III. That on the said day the mortgage became due, but has not been paid; and that said [mortgagee] has commenced an action [or, proceedings under the statute] to foreclose the same for such default.

IV. That on the                    day of                    , 18    , the plaintiff tendered                    dollars to said [mortgagee], being the amount due on said mortgage, with interest, and the costs of said action [or, proceeding] up to that time, in redemption of said mortgage, and has ever since been ready and willing to pay the same; and did then request him to assign the same to the plaintiff, but he refused so to do.

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(b) In a bill for an accounting and redemption, a distinct offer to pay the amount due is not necessary. The form is, that, on the payment of what, if any thing, shall be found due, the mortgagee may be decreed to deliver possession, &c. *Quin v. Brittain Hoffm.*, 353; and see *Barton v. May*, 3 *Sandf. Ch.*, 450.

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 Actions for Partition ; Admeasurement ; and to Determine Conflicting Claims.
 

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Wherefore, the plaintiff demands judgment that he be allowed to redeem the said mortgage upon paying to the defendant [*mortgagee*] the amount due upon the mortgage; and that upon such payment the defendant, by an assignment duly executed and acknowledged by him, assign said bond and mortgage to the plaintiff.

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 SECTION XXXI.

## COMPLAINTS IN ACTIONS FOR PARTITION; FOR ADMEASUREMENT OF DOWER; AND TO COMPEL DETERMINATION OF CLAIMS TO REAL PROPERTY.

687. For partition. General form.....	606
688. The same, setting forth sources of title .....	608
689. For admeasurement of dower .....	609
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 687. *For Partition. General Form.*

I. That the plaintiff, (a) and the defendants Y. and Z., own and possess, (b) as joint-tenants [*or, as tenants in common*], the following described premises: (c) [*particular description of the*

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(a) It is held that the wife should be a coplaintiff in an action by her husband for partition of lands in which she has an inchoate right of dower. *Ripple v. Gilborn*, 8 *How. Pr.*, 456; and see *Brownson v. Gifford*, *Id.*, 389.

(b) The complaint must show that the plaintiff is in possession, actual or constructive. *Stryker v. Lynch*, 11 *N. Y. Leg. Obs.* 116.

A person possessed of an undisputed title to an undivided share in remainder, although there be an existing admitted life-estate covering the whole premises, is "a person in possession of the lands of which partition is sought, as tenant in common," within the meaning of the statute. *Blakely v. Calder*, 13 *How. Pr.*, 476.

In a suit in chancery for partition, it

was presumed that the complainant was in possession, from the allegation that the parties were seized in common. *Jenkins v. Van Schaack*, 3 *Paige*, 242; and see *Burhans v. Burhans*, 2 *Barb. Ch.*, 398.

And so in proceedings by petition before the Code, where a party was stated to be seized of a certain portion, it was construed to mean a seizin in fee. *Lucet v. Beekman*, 2 *Cal.*, 385.

In such proceedings, it was held not necessary to state the source from which the tenants derived title. *Bradshaw v. Callaghan*, 8 *Johns.*, 558. And this rule is considered applicable under the Code. 2 *Van Santvo. Eq. Pr.*, 17.

(c) It is held that this action is a proceeding *in rem*, and that the jurisdiction of the court is confined to the sub-



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 Partition in Case of Incumbrancers, and Unknown Owners.
 

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*premises*]; and that the plaintiff is desirous of a partition of the same.

II. That the plaintiff has an estate of inheritance therein of one undivided fourth interest in the fee thereof [*or other estate*].

III. That each of the defendants [*cotenants*] have a similar estate of one undivided fourth interest in the same [*or otherwise*]. (*d*)

[*Where there are unknown owners.*] IV. That W. X., who, in his lifetime, had an estate of inheritance therein of one undivided fourth interest in the fee [*or otherwise*], several years since removed from this State to . That he subsequently married, and had children, some of whom are now living; but their names and places of residence are wholly unknown to the plaintiff, and, although he has made diligent inquiries for that purpose, he cannot ascertain the same, or either of them. That said W. X. and his said wife are now dead; and that said children and heirs, or the heirs at law of any who may be dead, are collectively entitled to the undivided fourth part of said premises to which said W. X. would be entitled, if living.

[*Where an infant is a party.*] V. That the plaintiff owns no other land in this State in common with the said [*cotenants*]. (*e*)

[*Where the lands are subject to dower.*] VI. That the defendant [*doweress*] is the widow of M. N., the father of the said [*cotenants*], from whom they inherited said premises; and, as such widow, claims a right of dower which has not been admeasured in [the following described part of] said premises. (*f*)

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ject-matter stated in the complaint. The plaintiff must seek partition of all lands in the State owned in common by the parties to the action, unless all parties consent to the bringing of a separate action for partition of a part. *Supreme Court Rules*, 72.

(*d*) The rights and interests of all the parties in the premises, so far as known to the complainant, or as he has information and belief, should be stated. If the share or interest of any party, or if the ownership of the inheritance, is contingent, so that the parties who may be ultimately entitled cannot be named,

the complainant should set forth the nature of such contingent interest. *Van Cortlandt v. Beekman*, 6 *Paige*, 492.

(*e*) This allegation is required where an infant is made a party, by *Rule 77 of 1858*.

(*f*) A widow claiming a right of dower is a proper but not a necessary party to proceedings for partition; and a judgment which makes not a sale but actual partition, in no way affects her interests, and should not be disturbed upon her motion to set aside for irregularity. *Gordon v. Sterling*, 13

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 Actions for Partition ; Admeasurement ; and to Determine Conflicting Claims.
 

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[ *Where they are subject to a judgment.* ] VII. That the defendant [*judgment-creditor*] holds a judgment recovered by him [*or, by one M. N., and thereafter duly assigned to him*], duly given in the                      Court [*or, in an action before O. P., justice of the peace in and for the town of*                      ], on or about the                      day of                      , 18                      , against [*one or more of the cotenants*], for the sum of                      dollars ; which judgment was, on the                      day of                      , 18                      , docketed in said county of [*the place where the premises are situated*], and remains unpaid and unsatisfied of record. (*g*)

[ *Where they are subject to a mortgage.* ] VIII. That the defendant [*mortgagee*] holds a mortgage upon the said interest of [*one of the cotenants*] for                      dollars, payable on the                      day of                      18                      , with interest from the                      day of                      , 18                      . (*h*)

Wherefore, the plaintiff asks judgment for [an accounting, and] a partition and division of said premises according to the respective rights of said parties ; or, if a partition cannot be had without material injury to those rights, then for a sale of said premises, and a division of the proceeds between the parties according to their rights, after payment of the costs of this action.

### 688. *The Same, Setting forth Sources of Title.*

I. That on or about the                      day of                      , 18                      , C. B., being owner in fee of the real property hereinafter described,

*How. Pr.*, 405 ; and see *Ash v. Cook*, 3 *Abbotts' Pr.*, 389 ; *Tanner v. Niles*, 1 *Barb.*, 560. Compare *Ripple v. Gilborn*, 8 *How. Pr.*, 456.

(*g*) A judgment-creditor of a deceased person is not entitled to be made a party to a partition suit instituted for the purpose of apportioning real estate of the late debtor among his heirs and devisees, in order to enforce his claim to be paid out of such real estate. *Waring v. Waring*, 3 *Abbotts' Pr.*, 246. But the complaint may state that one of the defendants claims to a specific lien on the premises, and ask for an

accounting. *Bogardus v. Parker*, 7 *How. Pr.*, 305.

(*h*) It was held in *Stryker v. Lynch* (11 *N. Y. Leg. Obs.*, 116), that it is not sufficient to aver merely that the defendant claims an interest adverse to the plaintiff, but the nature of the claim which the plaintiff controverts should be specially stated.

A complaint by heirs suing to have a partition, notwithstanding an apparent devise by the ancestor, and possession held under the same, must allege that such apparent devise is void. *Laws of 1853*, 526, ch. 238, § 2.

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Partition, where the Sources of Title are Set Forth. Dower.

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died intestate as to the same, which real property is described as follows: [*description*].

II. That the said C. B. left W. B., his widow, one of the defendants, who is entitled to dower in said premises.

III. That subject to said dower the premises descended to the following named persons, the only heirs of the deceased:

1. The plaintiff, A. B., who is a son of said C. B., deceased.  
 2. The defendant, E. B., a daughter of the said C. B., deceased, and wife of one L. B. of                      county, in the State of                      .

3. The defendants, F. M. and G. M., minor children of one F. B., a daughter of said C. B., deceased. The said F. B. intermarried with the defendant, H. M., and afterwards died intestate, leaving issue of said marriage F. M. and G. M., her only children and heirs, who reside in the county of                      , and for whom their father H. M., who resides in                      county, has been duly appointed guardian by the Probate Court of said county. The said H. M. is tenant by the curtesy of the estate of said children.

4. G. B., son and only heir of one H. B., deceased. The said H. B. was a son of said D. B., deceased. The said G. B., after said estate was cast upon him by descent as aforesaid, conveyed his estate in said premises, by deed duly executed, to the defendant X., who resides in                      .

IV. The parties above named have now the following undivided estate in said premises:

1. The plaintiff, one undivided [fourth] in fee.  
 2. The defendant E. B., one undivided [fourth] in fee.  
 3. The defendants F. M. and G. M., each one undivided [eighth] in fee, subject to the curtesy of their father, H. M.  
 4. The defendant X., one undivided [fourth] in fee.

[*Allege specific incumbrances, and demand relief, as in preceding form.*]

689. *For Admeasurement of Dower.* (i)

I. That the plaintiff was married to C. B. in the year                      , and lived and cohabited with him until his death, which was on the                      day of                      , 18                      .

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(i) This form is supported by *Townsend v. Townsend*, 2 *Sandf.*, 711  
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Actions for Partition; Admeasurement; and to Determine Conflicting Claims.

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II. That the said C. B., during said coverture of the plaintiff, was seized of an estate of inheritance of and in the lands situate in , and bounded and described as follows: [*description of the premises*].

III. That the defendant Z. is a son and heir of said C. B., of full age; and the defendant Y. is an infant son and heir of said C. B.

IV. That said C. B. left a will, which was duly proved and recorded in the office of the surrogate of , on or about the day of , 18 , by which he devised the premises [*or designate what portion was devised*] to the defendant W. for life, with remainder over to the defendants.

Wherefore, the plaintiff asks judgment for one equal undivided third of the premises, as and for her dower, and that it may be admeasured and set off to her, and for her costs.

690. *To Compel the Determination of Claims to Real Property. (j)*

I. That on the day of , 18 , one M. N. was seized in fee-simple [*or otherwise*] and possessed of the following described premises: [*particular description of premises*].

[*Where plaintiff claims by descent or devise.*] II. That on that day, being so seized and possessed, said M. N. died, leaving the plaintiff his sole heir [*or, leaving his last will duly made, which was on the day of , 18 , duly proved and admitted to probate by the surrogate of county, which will contained a devise to the plaintiff of said premises, or, of an estate for life, or otherwise, in said premises; of which the following is a copy: copy of devise*].

[*Or, where he claims by grant.*] II. That on that day, being so seized and possessed, said M. N., by his deed under his hand and seal, dated on that day, duly bargained, sold, and conveyed said premises to the plaintiff.]

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(j) This form is adopted in the Commissioners' report, p. 104. The proceeding is now an action under the Code. *Mann v. Provost*, 3 *Abbotts' Pr.*, 446; *Hammond v. Tillotson*, 18 *Barb.*, 332; *Stryker v. Lynch*, 11 *N. Y. Leg.*

*Obs.*, 116. As to what are the facts necessary to constitute the cause of action, see the provisions of the statute, 2 *Rev. Stat.*, 312; *Laws of 1848*, 67; *Laws of 1854*, 276; *Laws of 1855*, 943, ch. 511; *Hager v. Hager*, 38 *Barb.*, 92.

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 Actions to Dissolve Partnerships and Corporations.
 

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III. That as such heir [*or, devisee, or, grantee*], the plaintiff has an estate therein in fee [*or, for life, or, for*      years].

IV. That said premises now are, and at and for three years before the time of bringing this action, were in the actual possession of the plaintiff [*or, at the time of bringing this action, were in the actual possession of the plaintiff, and for three years next previous were in the actual possession of the plaintiff and the said M. N.*]

V. That the defendant unjustly claims title to said premises, in fee [*or, to an estate for life in said premises, or to an estate for*      years in said premises].

Wherefore the plaintiff demands judgment, that the defendant, and all persons claiming under him by title accruing subsequently to the commencement of this action, be forever barred from all claim to any estate of inheritance or freehold, or to any term of years not less than ten, (*k*) in the said premises; and for costs of this action.

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 SECTION XXXII.

## COMPLAINTS IN ACTIONS FOR DISSOLUTION OF PARTNERSHIPS AND CORPORATIONS.

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695. The same, against an insolvent banking association.....	617
696. By the attorney-general, to dissolve a corporation for exercising a franchise not conferred by law.....	618

 691. *To Dissolve a Partnership.*

I. That on the      day of      , 18      , the plaintiff and the defendants [*copartners*] formed a partnership for the purpose of [*state business*], under the following articles of partnership: [*set out articles, or annex copy, and say, under articles of copartnership, of which a copy is annexed as a part of this complaint, and marked Exhibit A.*]

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Actions to Dissolve Partnerships and Corporations.

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[*Or, if the agreement was not in writing, state its effect briefly,—e. g., under an agreement that the plaintiff should contribute the use of                  dollars capital, and that the plaintiff and the defendants [copartners] should co-operate in the care and labors of the business, and that the plaintiff should receive one-half of the net profits, and upon a dissolution of the partnership, repayment of his capital, and that the defendants should receive each one-quarter of the net profits.*]

II. That the plaintiff and defendants now own a valuable lease of premises No.       , street, in       , and a large and valuable stock of goods; that they have also a large amount of debts due to them, and a valuable good-will, which are of far greater value when taken together than if separated; and that no equitable divisions of the assets and good-will of said partnership can be made without great loss to all parties, except by a sale thereof together, and a division of the proceeds thereof.

[*Where the dissolution was by an assignment.*] III. That on the        day of       , 18   , the defendant [*a partner*] without the knowledge or assent of the plaintiff, by writing, assigned and transferred to the defendant [*assignee*], all his interest in said partnership, and all his right and title to any and all property belonging to said firm; whereby said partnership became dissolved.

[*Or, where the dissolution is by exclusion of the plaintiff.*] III. That on the        day of       , 18   , the defendant [*a partner*] took exclusive possession of the partnership books and stock, and then and ever since prevented the plaintiff from having access to the same.

[*Or, where the dissolution is upon notice given by one of the partners.*] III. That on the        day of       , 18   , the defendant [*or, the plaintiff*] pursuant to the provision of said agreement, gave to the [*defendant or plaintiff*] a written notice of his intention to dissolve said agreement, of which a copy is annexed as a part of this complaint, and marked Exhibit B.

[*Or, where the dissolution is on the ground of the insolvency or arrest of a partner.*] III. That the defendant before this action became insolvent, and on or about the        day of       , 18   , was arrested on the        day of       , 18   , at the suit of one M. N., for a debt of        dollars [and in consequence of such arrest, has ever since been a prisoner at       ]; and that

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To Dissolve Partnership for Fraud.

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by reason of such insolvency [and arrest] the partnership has been greatly discredited, and has sustained loss by the absence of said defendant therefrom.

Wherefore, the plaintiff demands judgment, that the said partnership be adjudged dissolved, that a receiver of the property, rights, and good-will of said partnership be appointed, with power to dispose of the same, and to collect all debts for the benefit of all parties entitled thereto, and that the proceeds thereof be divided, after payment of all just debts of said partnership and the costs of this action, between the parties hereto, according to their respective rights.

692. *For Dissolution of Partnership on Account of Defendant's Misappropriation of Funds. (a)*

I. [*As in preceding form.*]

II. That said plaintiff and defendant entered upon, and have ever since continued to carry on the said copartnership business, under and in pursuance of said agreement, no other articles or instrument having ever been executed between them.

III. That since the commencement of said partnership, the defendant has, from time to time, applied to his own use, from the receipts and profits of said business, large sums of money, greatly exceeding the proportion thereof to which he was entitled, and, in order to conceal the same, said defendant, who has always had the management of the copartnership books, has never balanced said books.

IV. That on or about the                      day of                      , 18    , the plaintiff discovered that the defendant was greatly indebted to said copartnership, by reason of his applying the copartnership moneys to his own use, as aforesaid; that the plaintiff then requested the defendant to pay all copartnership moneys that he received into the                      Bank, in which the copartnership was accustomed to keep its accounts, and to draw therefrom only such sums as such copartnership had occasion for; that said defendant wholly disregarded said request, and continued to apply the copartnership moneys received by him to his own use, without depositing the same in said bank, or any other

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(a) This form is, in substance, from the *Eq. Draft*, 307; and 2 *Van Santv. Eq. Pr.*, 568.

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Actions to Dissolve Partnerships and Corporations.

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bank, to the credit of the firm, and has also taken to his own use moneys received by the clerks of said firm, and has by such means greatly increased his debts to the copartnership, without affording to the plaintiff any adequate means of ascertaining the true state of his accounts.

V. That the defendant has received the sum of            dollars over and above his due proportion of the copartnership profits, and that he continues to collect the copartnership debts and appropriate the moneys to his own use.

Wherefore, the plaintiff demands judgment:

1. That the said copartnership may be dissolved, and an account taken of all the said copartnership dealings and transactions from the commencement thereof, and of the moneys received and paid by the plaintiff and defendant respectively in relation thereto.

2. That the property of the firm, real and personal, be sold, and the copartnership debts and liabilities be paid off, and the surplus, if any, divided between the plaintiff and defendant, according to their respective interests.

3. That in the mean time the defendant may be enjoined from collecting or receiving, or in any manner interfering or intermeddling with, or disposing of the partnership debts or moneys, or other property or effects of said partnership.

4. That a receiver of the partnership moneys, property, and effects may be appointed, with the usual powers and duties.

5. And for such other and further relief as may be just, with the costs of this action.

*693. By Administrator of Deceased Partner, against the Survivor.*

I. *As in Form 691, substituting decedent's name for the words "the plaintiff."*

II. That the said copartnership business was entered upon pursuant to said agreement, and continued to be carried on under and pursuant to the same up to the time of the death of the said [*decedent*], which occurred on the            day of            , 18    , said [*decedent*] having advanced large sums of money towards the capital stock.

III. That at the time of the death of the said [*decedent*] there



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By Administrator against Surviving Partner, for Accounting.

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was on hand partnership assets to the amount or value of about        dollars, as follows: a large amount of personal property, consisting of [*name it*], of the estimated value of        dollars; real estate, situated [*describe it*], of the estimated value of        dollars; together with book-accounts, notes, and other demands of the estimated value of        dollars; and the debts and liabilities of said firm amounted to about        dollars.

[*Allege appointment of executor or administrator, as in Form 185 or 187, ante, pp. 140-142.*]

IV. That ever since the death of said [*decedent*], the said defendant has continued, individually, in the possession of the store and all said real and personal property, and to manage and carry on said business, and dispose of said stock, and to collect the debts and things in action, and to pay debts and liabilities of said firm out of the avails thereof; and he has so collected large sums, the amount of which the plaintiff does not know and cannot ascertain.

V. That said defendant has not paid over to said plaintiff, as administrator of the estate of said [*decedent*], any moneys or other proceeds of said copartnership since the death of said [*decedent*], [except        dollars]; nor has he assigned, transferred, or delivered over to said plaintiff any of the assets, securities, or other property of said copartnership [except, &c., *describing what has been delivered, if any*].

VI. That within a few weeks last past, said defendant has become embarrassed in business, and has stopped payment, and is unable to give any security for the payment to the plaintiff, as the representative of said [*decedent*], of the value of the interest of said [*decedent*] in said copartnership.

VII. That the plaintiff has requested of said defendant a statement and account of said copartnership transactions, which the defendant refused to give; and that he has offered defendant to settle and wind up the affairs of said late copartnership in the manner specified in said agreement, which he has neglected to do.

Wherefore, the plaintiff demands:

1. That an account may be taken of all the said copartnership dealings and transactions, from the time of the commencement thereof to the time of dissolution by the death of said [*decedent*], and an account of the moneys received and paid by

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Actions to Dissolve Partnerships and Corporations.

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the said partners respectively in regard thereto; that the defendant may account with the plaintiff for all his dealings with, and transactions in regard to the property, assets, and effects of, said firm since its dissolution by the death of said [*decedent*], and the property sold or disposed of by him, either as surviving partner or otherwise, and of the moneys collected and received and paid out by him on account thereof.

2. That the defendant may be adjudged to pay the plaintiff, as administrator as aforesaid, what, if any thing, shall, upon the taking of the said accounts, appear to be due said plaintiff as administrator of said [*decedent*]; the said plaintiff, administrator as aforesaid, being ready and willing, and hereby offering to pay the defendant what, if any thing, shall appear to be due him on such accounting.

3. That a receiver be appointed, with the usual powers and duties, and under the usual directions; and that the defendant may be restrained by order of this court from disposing of, or in any manner interfering with, the property and effects of said firm, or from collecting or receiving the copartnership debts or other moneys coming to said firm.

4. For such other or further relief as may be just, with costs of this action.

694. *By a Creditor, to Dissolve a Corporation. (b)*

I. and II. [*Aver incorporation, as in Form 182 or 183, ante, p. 137; (c) and aver judgment and execution unsatisfied, as in Form 662, ante, 571.*]

II. That said company has become, and is insolvent, and unable to pay its debts.

IV. That the defendants [*officers*] are the trustees [*or, directors*] of said corporation.

V. That on the            day of           , 18   , the directors of said company, with intent to defraud the creditors of said corporation, confessed judgment against said corporation to the defendant Z., who is president thereof, for the sum of

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(b) Under 2 *Rev. Stat.*, 462.

(c) If this averment does not show that the corporation sued possesses the powers mentioned in 2 *Rev. Stat.*, 463, § 39, the possession of them should

also be alleged, where it is designed to proceed under that and the following sections.

The action must now, in N. Y., be by the Atty. Gen. *L.* 1870, c. 151, § 2.

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To Dissolve Corporation.    To Dissolve Banking Association.

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dollars: that an execution was on the same day issued therein, and levied on all the real and personal property of said corporation. That, in fact, the said corporation was not at that time indebted to said Z., but said judgment was confessed fraudulently and contrary to law, and for the purpose of covering up the property of said corporation, and defrauding the creditors thereof.

Wherefore, the plaintiff demands judgment:

1. That said corporation be dissolved.
2. That said judgment, execution, and levy be set aside.
3. That the directors of said company account for their management and disposition of the funds and property of said corporation committed to their charge, and that they pay all sums of money that may be found to be due from them, and the value of all property which they may have acquired themselves or transferred to others, or lost or wasted by any violation of their duties as directors.
4. That said company and its officers be restrained from exercising any of its corporate rights, privileges, or franchises, and from collecting or receiving any debts or demands, and from paying out, or in any way transferring or delivering to any person any of the moneys, property, or effects of such corporation, until the further order of the court.
5. That a receiver of its property and effects may be appointed pursuant to the provisions of the Revised Statutes, with the powers and authority conferred upon receivers in such cases. (*d*)
6. And for the costs of this action.

695. *The Same, against an Insolvent Banking Association.*

I. [*As in Form 178, p. 133.*]

II. That the plaintiff has heretofore kept account with said defendants, and deposited money with them, and drawn for the same by his checks; and that on the                  day of                  , 18    ,

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(*d*) A complaint which asks for a receiver of the property of a corporation which is sued, without asking for its dissolution, and for an injunction against its trustees, without making them parties, or even stating who they are, is defective and demurrable. *Reid v. The Evergreens*, 21 *How. Pr.*, 319.

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Actions to Dissolve Partnerships and Corporations.

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he had on deposit with the said defendants, over and above all claims and demands thereon, upwards of        dollars.

III. That on said day he drew his check, of which the following is a copy: [*copy check*], which has been duly presented by the plaintiff; but the defendants are unable, and have refused, to pay the same.

IV. That the said defendants have suspended payments, and ceased to exercise their ordinary business, and are unable to pay their debts, and are insolvent, and have violated the provisions of the act under which they were organized.

[*For demand of relief, see preceding form.*]

696. *By the Attorney-general, to Dissolve a Corporation for Exercising a Franchise Not Conferred by Law. (e)*

I. [*Aver incorporation of defendants: see Forms 178-184, ante, p. 133.*]

II. That said corporation for the space of        months past has exercised, without any warrant, charter, or grant, the franchise of banking, and has issued notes, received deposits, made discounts, and transacted other banking business to which it was not authorized, and has exercised franchises not conferred upon it by law.

Wherefore, the plaintiffs demand judgment, that the defendants [*corporation*] be excluded from all corporate rights, privileges, and franchises, and that said corporation be dissolved; and for the costs of this action.

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(e) As to the rules of pleading in such actions, see *Code of Pro.*, §§ 434, 435; *People v. Ravenswood, &c.*, Turnpike & Bridge Co., 20 *Barb.*, 518; *People v. Utica Ins. Co.*, 15 *Johns.*, 358; *People v. Richardson*, 4 *Cow.*, 97.

In pleading the ground of a forfeiture for neglect of a corporation to per-

form an act which is required only under peculiar circumstances, the condition upon which the company incurred the obligation to do it must be specifically and substantially alleged. *People v. Bristol & Rensselaerville Turnpike Co.*, 23 *Wend.*, 222.

## For Usurping Elective Office.

## SECTION XXXIII.

## COMPLAINTS IN ACTIONS FOR USURPING OFFICE.

[In an action against a person for usurping an office, the attorney-general, in addition to the statement of the cause of action, may set forth in the complaint the name of the person rightfully entitled to the office, with a statement of his right thereto. (a)]

The complaint need not aver that the claimant possessed the requisite qualifications for the office, nor that he has taken the oath and given the bond of office; nor need it state the number of votes given. (b)

The complaint may be good as against defendants, notwithstanding defects in allegations inserted to show the relator's title.] (c)

697. For an elective office. . . . . p. 619

698. For an office not elective . . . . . 620

697. *For an Elective Office.* (d)

I. That on the                      day of November, 18     , at an election duly held in the [*designate the county or district*] of this State, pursuant to the statute, for the election, among other officers, of [a county judge of said county], for the term of                      years from the first day of January, 18     , the said [*individual plaintiff*] received the greatest number [*or, the majority, according to the statute*] of legal votes for the said office, and was duly elected.

II. That on the                      day of                      , 18     , the defendant usurped the said office, and has ever since unlawfully exercised the same, and withheld the same from the said [*individual plaintiff*] (e)

(a) *Code of Pro.*, § 435.

(b) *People ex rel. Crane v. Ryder*, 12 *N. Y.* (2 *Kern.*), 433; *S. C.*, 16 *Barb.*, 370.

(c) *Flynn v. Abbott*, 16 *Cal.*, 358; *People v. Ryder*, 16 *Barb.*, 370.

(d) This form is sustained by *People ex rel. Crane v. Ryder*, 12 *N. Y.* (2 *Kern.*), 433; *Platt v. Stout*, 14 *Abbotts' Pr.*, 178.

A complaint for usurping an office which has no legal existence, may be framed by omitting the first allega-

tion, and the last clause in the demand of relief, and alleging that defendant has unlawfully usurped the duties of the office specified, and that no such office exists by law, and that the acts of defendant are without authority of law. *People v. Carpenter*, 24 *N. Y.*, 86.

(e) Allegations showing that defendant is in possession of the office without lawful authority, would sufficiently import intrusion and usurpation, at least after judgment. *People v. Woodbury*, 14 *Cal.*, 43.

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 Actions for Usurping Office.
 

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Wherefore, the plaintiff demands judgment, with costs :

1. That the defendant is not entitled to the said office, and that he be ousted therefrom.

2. That the said [*individual plaintiff*] is entitled to the office, and to assume the execution of the duties of the same on taking the oath and filing the bond prescribed by law.

698. *For an Office not Elective. (f)*

I. That at the times hereafter mentioned, in the municipal corporation entitled "The Mayor, Aldermen, and Commonalty of the City of New York," there was, and still is, an executive department created and existing under the laws of this State, known as the street department, the chief officer of which department is called the street commissioner, which office of street commissioner was and is a public office in said city.

II. That in the month of \_\_\_\_\_, 18\_\_\_\_, one J. S. T. was duly elected to said office, for the term of \_\_\_\_\_ years from the day of \_\_\_\_\_, 18\_\_\_\_, and on said day entered upon the duties of said office, and discharged the duties thereof until the day of \_\_\_\_\_, 18\_\_\_\_, when he died, whereby the office became, and thence, until and at the time of the appointment hereinafter referred to, continued vacant.

III. That after said death, and on the \_\_\_\_\_ day of \_\_\_\_\_, 18\_\_\_\_, the said [*individual plaintiff*] was appointed to said office by the mayor of said city, with the advice and consent of the Board of Aldermen of said city, and thereafter, and on the same day, in due form of law, and according to the ordinances of the corporation of said city, he gave sufficient security for the performance of his duties as such street commissioner, in the form and amount for that purpose prescribed by the said ordinances, and took and subscribed, before the mayor of said city, and filed, his oath in the following form: [*copy oath*]. And that he accepted such appointment, and in all respects qualified himself to assume such office, and perform the duties thereof.

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(f) This is, in substance, the complaint in *People v. Conover*, which was sustained on demurrer. 6 *Abbotts' Pr.* 220.

For another precedent which may readily be adapted to an action respecting the title to the office, see Form 241 *ante*, p. 185.

## Analysis of the Section.

IV. That the defendant, claiming to have been appointed by the governor of the State of New York, to fill the aforesaid vacancy, created by the death of said J. S. T., and without any other or any legal warrant, right, or grant whatever, intruded into and usurped said office, and still unlawfully holds and exercises the same.

[*Conclude as in preceding form.*]

## SECTION XXXIV.

## COMPLAINTS IN ACTIONS FOR DIVORCE.

[Actions for divorce are so generally regulated by statute, and with diverse provisions in different States, that in using these forms reference should be had to the statutes of the State where the action is brought.

In some cases, the action may be by the parent or guardian, or a relative; and when this course is pursued, the complaint should aver the relationship. (a)

Under the statute of New York, it seems unnecessary to refer, in the demand for relief, to alimony or the custody of children. These matters are rather like provisional remedies, or proceedings upon a judgment, than a part of the relief to be specified in the complaint.]

699. For divorce, on the ground of adultery .....	p. 621
700. For limited divorce, on the ground of cruel and inhuman treatment ..	624
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699. *For a Divorce on the Ground of Adultery. (b)*

1. That on the                      day of                      , 18                      , at                      [in this State], the plaintiff was married to the defendant.

(a) In such cases, Van Santvoord recommends that both husband and wife be made defendants. 2 *Eq. Pr.*, 255.                      cannot be sought in the same action with a limited divorce for ill-treatment. Charges of adultery and of cruel usage, being distinct and independent, and leading to distinct issues and decrees.

(b) An absolute divorce for adultery

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 Actions for Divorce.
 

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II. That the plaintiff and the defendant were, at the time of the commission of the several acts of adultery hereinafter mentioned, inhabitants of this State.

[*Or, if the marriage is alleged to have taken place within this State*,—That the plaintiff, at the time, &c., as above, was, and now is, an actual inhabitant of this State.]

[*Or, if the adultery is charged to have been committed within this State*,—That the plaintiff now is [*or, at the commencement of this action was*] (c) an actual inhabitant of this State.]

III. That on the                    day of                   , 18                   , at the house of  
[*or, at No.                   ,                    street*], in the city of                   ,  
the defendant committed adultery with one M. N. (d)

[*Charge of repetition*]. IV. That a few days subsequently thereto, the defendant again committed adultery, at the house aforesaid, with the said M. N.

[*Where the precise time is not known.*] V. That between the  
day of                   , 18                   , and the                    day of                   , 18                   ,  
at times which the plaintiff is unable more particularly to state,  
the defendant [*&c., as above*].

[*Where the place is not known.*] VI. That on the                    day  
of                   , 18                   , at some place in the city of                   , which the  
plaintiff is unable more particularly to state, the defendant [*&c., as above*].

[*Where time and place are not known.*] VII. That at divers  
places within the city of                   , and at various times between  
the                    day of                   , 18                   , last and this action, but at what  
particular times and places the plaintiff is unable to state, the  
defendant has committed adultery with one M. N.

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cannot be united. *Johnson v. Johnson*, 6 *Johns. Ch.*, 163; *Smith v. Smith*, 4 *Paige*, 92; *Rose v. Rose*, 11 *Id.*, 166. And the same rule is applied under the Code of Procedure. *McIntosh v. McIntosh*, 12 *How. Pr.*, 289.

(c) The statute prescribes that the plaintiff must be, at the time of "exhibiting the bill of complaint," an inhabitant of the State. Under the old equity practice, this was in effect the commencement of the action; and it is probable that the statute is satisfied by an allegation that the plaintiff was, at

the commencement of the action, an inhabitant of the State. For greater safety, however, it is well to follow the form of the text, wherever consistent with the truth.

(d) This is the proper form where the facts are known. It was held, however, in *Farr v. Farr* (34 *Miss. (5 Geo.)*, 597), that to avoid scandal the name of the third person need not be given, if sufficient certainty can otherwise be had.

Either one of the paragraphs from V. to IX. are sufficient instead of this paragraph.



## On Account of Adultery.

[ *Where the paramour is not known.*] VIII. That on the day of \_\_\_\_\_, 18\_\_\_\_, at the house of \_\_\_\_\_ [or, at No. \_\_\_\_\_, \_\_\_\_\_ street], in the town of \_\_\_\_\_, the defendant committed adultery with a man [or, a woman], whose name is unknown to the plaintiff [or, one or more women, whose names are unknown to the plaintiff]. (e)

[ *Charge of living in adulterous intercourse.*] IX. That the defendant has committed adultery with one M. N., and ever since the \_\_\_\_\_ day of \_\_\_\_\_ has been living in adulterous intercourse with him [or, her] at \_\_\_\_\_.

X. That such adultery was committed without the consent, connivance, privity, or procurement of the plaintiff; that five years have not elapsed since the plaintiff discovered the fact of such adultery [or, *when living in adulterous intercourse is charged*, that five years have not elapsed since the commencement of such adulterous intercourse was discovered by the plaintiff]; and that the plaintiff has not voluntarily cohabited with the defendant since such discovery [or, since the commission of the last offence above alleged]. (f)

XI. That there are no issue of the said marriage of the plaintiff and defendant [or, That the issue of the said marriage of the plaintiff and defendant are two children, named \_\_\_\_\_, aged \_\_\_\_\_ years, and \_\_\_\_\_, aged \_\_\_\_\_ years. (g)]

[ *Where there are illegitimate children of guilty wife.*] XII.

(e) This allegation is sustained by *Germond v. Germond*, 6 *Johns. Ch.*, 347. But if the person is unknown, the place should be distinctly stated. *Heyde v. Heyde*, 4 *Sandf.*, 692; *Kane v. Kane*, 3 *Edw.*, 389.

It was the rule in chancery, that an allegation which was too general in respect to the circumstances of the offence, would not avail to authorize a feigned issue or to admit evidence. *Codd v. Codd*, 2 *Johns. Ch.*, 224; *Whispell v. Whispell*, 4 *Barb.*, 217; *Wood v. Wood*, 2 *Paige*, 108; *Kane v. Kane*, 3 *Edw.*, 389.

And this rule has been in many cases followed in practice under the Code in this State.

It was, however, held in *Conant v.*

*Conant* (10 *Cal.*, 249), that though a complaint which is defective in these respects is demurrable, yet by failing to demur the defendant waives the objection. And in *Ingersoll v. Ingersoll* (1 *Code R.*, 102), the court refused to strike out such a general averment, holding that it was not immaterial, but tended to show a cause of action.

(f) The allegations of paragraph X. are not essential; but Rule 86 of 1858 requires an affidavit to the same facts, unless they are inserted in the complaint, and it is verified by the plaintiff.

(g) This clause, though usual when there are children, &c., is probably unnecessary under our statute.

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 Actions for Divorce.
 

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That since the commission of said adultery the defendant has born a child, now            months old, and called           , who is not the child of the plaintiff, but illegitimate, as he believes. (*h*)

Wherefore, the plaintiff demands judgment that the bonds of matrimony between [him] self and the defendant be dissolved. [*If there are any children living, add: (i) and that the custody of the said children be awarded to the plaintiff. If the wife is plaintiff, add: (i) and that a reasonable provision for the support of the plaintiff and her said children be made out of the property of the defendant.*] And for the costs of this action.

700. *For Limited Divorce, on Account of Cruel and Inhuman Treatment.*

I. That on the            day of           , 18   , at           , in the State of           , she was married to the defendant.

II. That both the plaintiff and the defendant were, at the commencement of this action, and still are, actual inhabitants of this State.

[*Or, if the marriage is alleged to have taken place in this State, it is enough to say: II. That the plaintiff was, at the commencement of this action, and still is, an actual resident of this State.*]

[*Or, if the marriage is not alleged to have taken place in this State: II. That the plaintiff and defendant have, since their said marriage, become inhabitants of this State, and so remained for one year from the            day of           , 18   ; and the plaintiff was, at the commencement of this action, and still is, an actual resident of this State.*]

III. That since said marriage the defendant has treated her in a cruel and inhuman manner, and since about the beginning of the year 18   , has been an habitual drunkard, and in his fits of drunkenness has repeatedly committed acts of cruelty and violence upon deponent and her children, and in particular as follows: [*state the specific acts,—e. g., thus:.*] On the day of           , 18   , at           , the defendant, without any

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(*h*) This allegation is required, by Rule 90, where the plaintiff would question the legitimacy.

(*i*) These clauses, though usual, are not probably necessary under our statute.

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 On Account of Cruel and Inhuman Treatment.
 

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provocation, struck and beat the plaintiff, severely injuring her face and breast; and on the                      day of                      , 18                      , at                      , the defendant again, without any provocation, knocked the plaintiff down, and kicked her in the side; (j) and that defendant's entire course of conduct towards the plaintiff, with rare intervals, has been for a long period uniformly brutal and abusive, he being constantly in the habit of applying abusive epithets to her, of threatening her with violence, and of striking and attempting to strike her; and it has become entirely unsafe for her to live with him.

[Or, That on the                      day of                      , 18                      , the defendant abandoned the plaintiff [and expelled her from his residence, and has refused to permit her to return], and has since refused [or, neglected], and still does refuse [or, neglect], to provide for her.]

IV. [As to children, as in Form 699.]

V. That in and about the year                      , and after their marriage, the said defendant received                      dollars as the distributive share of the plaintiff in her father's estate; the whole of which the defendant has applied and converted to his own use. And that the defendant owns real estate to the amount of                      dollars, and personal estate to the amount of                      dollars.

Wherefore, the plaintiff demands judgment for a separation from the bed and board of the defendant [*conclude as in preceding form*].

701. *Allegation of Wilful Absence.* (k)

That although the plaintiff has always conducted herself towards the said defendant as a faithful and obedient wife, the defendant, disregarding his duties as a husband, has been wilfully absent from the plaintiff for more than                      years last

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(j) The complaint must state specific acts. 2 *Rev. Stat.*, 147; Anonymous, 11 *Abbotts' Pr.*, 231; S. C., *sub nom.* Walton v. Walton, 32 *Barb.*, 203.

These specifications present the matter in issue to which the proof is to be directed; but it is also proper to look at the general conduct of defendant to-

wards plaintiff, for the purpose of understanding more fully the particular circumstances complained of. *Whispell v. Whispell*, 4 *Barb.*, 217.

(k) This and the two following are not ground of divorce in this State, but are in some others.

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 Actions for Divorce.
 

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past, without any cause or justification therefor, so far as the plaintiff is concerned.

702. *Allegation of Drunkenness.*

The defendant, disregarding his duties as a husband towards the plaintiff, has been guilty of habitual drunkenness for the years last past.

703. *Allegation of Imprisonment.*

That at the term of the Court of , in and for the county of , and before this action, the defendant was duly convicted of the crime of , and duly sentenced by said court to confinement in the of this State for the term of years; and, in pursuance of the said sentence, the defendant is now confined in said- .

704. *For Divorce on Account of Nonage. (l)*

I. [State appointment of guardian, as in Form 193 or 194, ante, p. 145.]

II. That on the day of , 18 , at , the plaintiff was married to the defendant.

III. That at the time of such marriage they were, and ever since have been, inhabitants of this State. (m)

IV. That at the time of such marriage the plaintiff had not attained to the age of [if the female, say, twelve, if the male, say, fourteen] years, but was of the age of years on the day of then last past.

V. That since the plaintiff has attained to the age of [twelve] years [she] has never voluntarily or freely cohabited with the defendant.

Wherefore, the plaintiff demands judgment that the said marriage be annulled and declared void, and for the costs of this action.

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(l) For the facts to be stated where husband, see *Laws of 1841*, ch. 257. the suit is on behalf of the female under (m) This averment is usual, but does not seem to be required by the statute. fourteen, the marriage having been a 2 *Rev. Stat.*, 142. punishable offence on the part of the

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 On Account of Lunacy, or Fraud.
 

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705. *For Divorce on the Ground of Lunacy.* (n)

[I., II., and III. as in preceding form, except that, where the plaintiff has been restored to reason, omit I.]

IV. That at the time of such marriage she was a lunatic, and incapable of contracting a marriage; and has been ever since [or, and that she remained a lunatic for the space of about six months after such marriage]. (o)

V. That her reason was restored about the month of , and that she is now of sound mind; (p) but that she has not cohabited with the defendant since she was restored to a sound mind.

[Demand of judgment as in preceding form.]

706. *For Divorce, on the Ground of Fraud by Husband.*

I. That on the day of , 18 , at , the plaintiff was married to the defendant.

II. That for the purpose of inducing the plaintiff to consent to the said marriage, the defendant falsely and fraudulently represented \* to [her] that he was one A. B., whom the plaintiff knew by reputation to be a respectable and honorable man and he concealed from the plaintiff his real name and character.

III. That the defendant's real name is, and always was, C. D., and not A. B.; and that he was and is a man of very bad repute, having been convicted of forgery, and confined in the State prison at Sing Sing in this State, under sentence therefor, for years. \*

IV. That the plaintiff was induced to consent to the said marriage by the said representations, which she believed at the time of her said marriage to be true, [and by her ignorance of the facts so concealed]; and that if the said representations had not been made to her [and said concealment had not been practised], she would never have consented to the said marriage.

V. That immediately upon her discovery of the falsehood of the said representations, to wit, on the day of ,

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(n) See 2 Rev. Stat., 142; also, had; but this is unnecessary. 2 Van Wightman v. Wightman, 4 Johns. Ch., Santv. Eq. Pr., 252.  
343.

(p) This allegation is proper where the plaintiff does not sue by guardian-  
(o) It has been usual to aver a com- mission of lunacy, where such has been

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 Actions for Divorce.
 

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18 , the plaintiff left the defendant's house, and has never since cohabited with him.

[*Demand of judgment as in Form 704.*]

707. *The Same, by Wife.*

*Substitute in preceding form, for the words between the asterisks:* to the plaintiff that she was a chaste and virtuous woman, which representation the plaintiff believed to be true.

III. That defendant was in fact unchaste and of lewd habits, and was the mother of an illegitimate child; which facts the defendant fraudulently concealed from the plaintiff.

708. *For Divorce for Physical Incapacity.*

I. That on the            day of            , 18    , and within two years before this action, at            , she was married to the defendant.

II. [*See III., in Form 704.*]

III. That the defendant was then, and ever since has remained, physically incapable of entering into the marriage state or of consummating the said marriage, by reason of incurable personal defects, in that [*here the nature of the incapacity may be briefly stated,—e. g., thus:*] the uterus and vagina of the said defendant were, at the time of such inter-marriage, and for a long time previous thereto had been, in a diseased, and in a schirrous, cartilaginous, and ulcerated state, and unnaturally thickened and indurated. (*q*)

IV. That said incapacity was known to the defendant at the time of contracting said marriage, but was unknown to the plaintiff. (*r*)

[*Demand of judgment, as in Form 704.*]

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(*q*) The allegations frequently inserted in the Code, they are needless and objectionable.

ed, in a suit by the wife, that the plaintiff is a virgin intact, and was apt and willing, &c., are mere matters of evidence, tending to establish the main fact of the defendant's incapacity. In a bill in chancery, such averments were proper and useful; in a pleading under

(*r*) This allegation is usual, but seems unnecessary, except where it can be added that the concealment was fraudulent, so as to make an additional cause of dissolution.

















